



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 38 OF 2018**

**JAMES MUTHOMI NJERU** *[Suing in his capacity as the*

*Legal Representative of the Estate of the late Agnes Tirindi Njeru-Deceased]*.....**APPELLANT**

**VERSUS**

**JOSEPH ERASMUS MUGO ALIAS JOSEPH MUGOH**.....**RESPONDENT**

**JUDGMENT**

1. This appeal is against the decision of the trial court in Siakago PMCC No. 30 of 2018 on quantum of damages awarded to the appellant under the *Fatal Accidents Act*.

2. The brief background of the appeal is that the appellant in his capacity as the legal representative of the estate of the late *Agnes Tirindi Njeru* sued the respondent for general and special damages under both the *Law Reform Act* and the *Fatal Accidents Act*. The suit proceeded for full hearing after which the learned trial magistrate *Hon. Omwange J. (RM)* delivered a judgment on 5<sup>th</sup> July 2018 in which he found the respondent 100% liable for the accident which caused the deceased's death and proceeded to award damages as follows:

Special damages - KShs.211,780

Pain and suffering - KShs.100,000

Loss of dependency - KShs.270,832

Loss of expectation of life - KShs.100,000

Less double entitlement - (KShs.100,000)

Total    KShs.582,612

3. The appellant was dissatisfied with the trial court's decision on quantum hence this appeal. In his memorandum of appeal filed on 2<sup>nd</sup> August 2018, the appellant advanced eight grounds of appeal in which he complained that the learned trial magistrate erred in law and fact when assessing damages for loss of dependency by adopting the wrong multiplier and multiplicand; by deducting KShs.100,000 from the sum awarded which he referred to as "double entitlement" and by disregarding his written submissions and authorities.

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

5. This being a first appeal on quantum only, it is important to remind ourselves of the principles that guide an appellate court in deciding whether or not to interfere with an award of damages made by a trial court. The principles have been developed through case law in a long line of authorities. The general thread that runs through those authorities is that as a general rule, the assessment of damages is at the discretion of the trial court but an appellate court can interfere with the award if it is satisfied that in arriving at its decision, the trial court misapprehended either the evidence or the law or that it considered irrelevant factors or failed to consider relevant ones. The court can also interfere with the award if it is either too low or too high as to amount to an erroneous estimate. See: *Mariga V Musila, [1984] KLR 251; Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30; Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1.*

6. I have carefully considered the grounds of appeal, the evidence on record and the parties' rival written submissions.

Before dealing with the gravamen of the appellant's appeal which relates to assessment of damages for loss of dependency, I wish to first deal with his complaint that the learned trial magistrate erred in disregarding his written submissions and authorities.

7. A reading of the judgment delivered by the learned trial magistrate shows that though he did not specifically state that he had considered the parties' submissions and did not refer to any authority, it is clear from his reasoning that he had in fact considered the written submissions filed by both parties though he erroneously indicated that the appellant did not make any proposals on quantum. Nothing therefore turns on that ground of appeal.

8. Turning now to the crux of the appeal as indicated above, the appellant has submitted that in assessing damages for loss of dependency, the learned trial magistrate misapprehended the evidence and applied the wrong legal principles thereby awarding him an amount which was inordinately low.

9. The respondent countered this submission by denying that the award was low. According to the respondent, the award was fair and was a product of the trial court's proper exercise of discretion. He urged me to find that the appellant had not established any basis to warrant interference with the award.

10. At the outset, it is important to point out that dependency is a question of fact which must be proved by evidence at the trial. In this case, it is evident from the record that it was not disputed that the deceased had five dependants including the appellant who solely depended on her for their school fees and livelihoods.

11. It was also not disputed that at the time of her demise, the deceased was a healthy 58 year old professional nurse who was running a private clinic. PW3 testified that he used to work for the deceased at her Upendo Clinic till June 2016. He stated that he is the one who used to keep her books of accounts and in his witness statement which he adopted as part of his evidence in chief, he claimed that the deceased used to earn between KShs.4,000 - KShs.10,000 daily which translated to a minimum income of KShs.120,000 per month. He did not however produce any documentary evidence to substantiate this claim.

12. The appellant who is the deceased's son testified that the deceased used to earn a minimum of KShs.100,000 from the clinic. He did not also have any documents to prove his claim.

13. The learned trial magistrate in his judgment correctly observed that the appellant's evidence on what used to be the deceased's income was uncontroverted since the respondent did not tender any evidence to the contrary during the trial but interestingly, he chose to adopt the minimum wage of a general worker in the sum of KShs.12,927 as the multiplicand to which he added KShs.4,000 which in his view was the monthly income derived from the clinic. This was a total misapprehension of the evidence. PW3's uncontroverted evidence was that the clinic earned a minimum income of KShs.4,000 per day not per month.

14. Although the evidence on the deceased's income was not rebutted by any other evidence by the respondent, this in itself did not absolve the learned trial magistrate from his responsibility of thoroughly interrogating the evidence to determine whether the appellant had discharged his burden of proving the deceased's income prior to her demise to the required legal standard because proof of income forms the basis of assessing damages for loss of dependency if the court chooses to use the multiplier method like in this case. The law is that he who alleges must prove and having alleged that the deceased used to earn a minimum income of between KShs.100,000 -120,000 per month, the appellant had the burden of proving that claim by way of evidence. He did not do so.

15. That said, it is my view that failure to produce documentary evidence to prove the deceased's actual earnings is not equivalent to failure to prove that the deceased used to earn some income from her private clinic. It only means that her actual income was not ascertainable. Given that it is not disputed that the deceased had five dependants for whom she was paying school fees including university fees and providing for their daily needs, I am prepared to find, which I hereby do, that she was earning a reasonable income prior to her death.

16. Considering that it was impossible to ascertain from the evidence the deceased's actual income, it is my opinion that the multiplier approach in the assessment of damages for loss of dependency was not appropriate or suitable in this case. The multiplier approach is not the only recognized method of assessing such damages. The evidence in this case was more facilitative of the global or lump sum approach rather than the multiplier approach.

17. I agree and fully 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.”***

18. In this case, I am satisfied that the trial court erred in using the multiplier approach and that is why the learned trial magistrate ended up speculating on the multiplicand. His finding that the mandatory retirement age of 60 years applied to the deceased was also clearly wrong in the light of uncontested evidence that the deceased was not a public servant but was a nurse in private practice at the time of her death. In other words, she was operating a business in the form of a private clinic and would probably have continued working well beyond her 60<sup>th</sup> birthday had her life not been cut short by the unfortunate accident.

19. In view of the foregoing, given that the deceased was aged 58 years at the time of her death and having found that she was earning a reasonable income from her private clinic which enabled her to fully support five young dependants, doing the best I can and having taken into account the vicissitudes of life, I find an award of KShs.3,500,000 fair and reasonable to compensate the appellant and his siblings for

loss of dependency. I therefore set aside the award made by the trial court and substitute it with an award of KShs.3,500,000.

20. Regarding whether the trial court erred in deducting KShs.100,000 awarded for lost years from the award made for loss of dependency, I have considered the persuasive authorities cited by the respondent in support of the proposition that the award for lost years should be deducted to avoid overcompensating the deceased's dependants. This was the position taken by Nyamweya J in *Transpares Kenya Limited & Another V SMM Suing as the Legal Representative for and on Behalf of the Estate of EMM [Deceased]*, [2015] eKLR and Majanja J in *Richard Matheka Musyoka & Another V Susan Aoko & Anoter [Suing as the Administrators of Joseph Onyango Owiti [Deceased]]*, [2016] eKLR.

21. On my part, I take a different view which I have expressed in several previous decisions including the recent decision in *David Kiprono & 2 others v Mary Wambeti Mugira [suing as legal representative of the estate of James Mbogo Njagi [deceased]]*, [2020] eKLR.

22. My take is that a close reading of Section 2 (5) of the *Law Reform Act* and Section 4 (2) of the *Fatal Accidents Act* reveals that beneficiaries of an estate who also happen to be the deceased's dependants can legally seek and obtain damages under both the *Law Reform Act* and the *Fatal Accidents Act* but in awarding damages for loss of dependency, the trial court should take into account the damages awarded for lost years.

23. The Court of Appeal in *Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another*, [1987] KLR 30 while interpreting Section 4 (2) of the *Fatal Accidents Act* emphasized that the words used in the section namely "take into account" referred to matters which ought to be taken into account when assessing damages under the Act and not necessarily what should be deducted. The court reiterated that whereas there was need to award conventional sums to avoid over compensating the same persons, there was no requirement in law for the trial court to engage in mathematical deductions.

24. In this case, the learned trial magistrate had awarded a conventional sum of KShs.100,000 for lost years and in my view, there was no legal justification to warrant deduction of the amount from the award the court had made for loss of dependency. In the premises, the trial court's decision to deduct the award was erroneous and is hereby set aside.

25. The damages awarded under the *Law Reform Act* were not contested on appeal and they will therefore remain undisturbed.

26. Regarding special damages, the trial court awarded the appellant KShs.211,780 which the respondent purported to challenge through his written submissions. If the respondent was of the view that the award was erroneous, he ought to have filed a cross appeal which he did not do. I do not therefore find any basis to interfere with the award.

27. For the foregoing reasons, I find merit in the appeal and it is hereby allowed. The damages payable to the appellant will now be as follows:

Pain and suffering - KShs.100,000

Loss of expectation of life - KShs.100,000

Loss of dependency - KShs.3,500,000

Special damages - KShs.211,780

Total KShs.3,911,780

28. The total award of general damages will earn interest from the date of the trial court's judgment till payment in full. The award of special damages will attract interest from the date of filing of suit until payment in full.

29. Costs follow the event and are at the discretion of the court. The appellant is awarded costs of the suit in the lower court but each party will bear his 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

No appearance for the respondent

Esterina: Court Assistant