



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO.54 OF 2020**

**BETWEEN**

**MUTIGA KAMAI.....APPELLANT**

**AND**

**JOSHUA KINYUA KAMANGE**

**(suing as administrator and legal representative of the estate of**

**Elijah Kamange (Deceased).....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Maua PMCC No. 69 OF 2018**

**by Hon. C.K.Obara (PM) on 29<sup>th</sup> June, 2020)**

**JUDGMENT**

1. **JOSHUA KINYUA KAMANGE (Appellant)** suing as administrator and legal representative of the estate **Elijah Kamange (Deceased)** filed suit in the lower court against **MUTIGA KAMAI (Respondent)** seeking damages for fatal injuries suffered by his son **Elijah Kamange (Deceased)** on 30.05.2015 when Appellant negligently drove his motor vehicle **KCA 406T** in which the deceased was a passenger as a result of which he lost control of the vehicle causing it to roll consequent to which deceased suffered fatal injuries.

2. The Defendant/Appellant in his statement of Defence denied the claim and pleaded that the accident was an act of God.

3. The learned trial magistrate found that the Appellant was wholly to blame for the accident and entered judgment in favour of the Respondent.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 01.02.2021 mainly on the ground that the award of Kshs. 2.5 million for loss of dependency is inordinately excessive and a wholly erroneous estimate of damages in the circumstances of this case.

**Analysis and Determination**

5. The law is quite clear as to when an appellate court can interfere with the trial court's exercise of discretion in arriving at quantum of damages. The Court of Appeal in **BUTT –VS- KHAN (1982 – 88) KAR 1** set the parameters as follows:

**“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 arrived at a figure which was either inordinately high or low.”**

6. I have considered the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves

around the question of both liability and quantum.

7. Both counsel are in agreement with the decision by the trial magistrate that the multiplier approach to calculation of the award for loss of dependency was not suitable in the current case for the simple reason that the deceased's earnings were not proved.

8. In awarding a global sum for loss of dependency, the trial court appreciated the holding in the case **Albert Odawa -Vs- Gichimu Githenji; Nakuru HCCA No.15 of 2003 (2007), eKLR** where Justice Ringera 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.”**

9. The issue in question is whether the sum of 2.5 million is inordinately high that it must be a wholly erroneous estimate of the damage.

10. In the celebrated case of **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727** the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge

**“it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...”**

11. At the hearing, the Respondent relied on **Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] eKLR** where the court applied a multiplicand of ksh. 27,000 and a multiplier of 30 awarded Kshs. 2,400,000/- for a aged 22 year student nurse.

12. Appellant on the other hand proposed a global sum of Kshs. 300,000/- and placed reliance on **Kenya Power & Lighting Co. v Charles Obeya Ogeta (Suing as legal representative of the estate of Esther Nyanchoka Obegi [2016] eKLR** where a global sum of Kshs. 300,000/- was awarded for the death of a 47-year-old.

13. Having looked at all the evidence before me it is clear that trial court, none of the parties made any submission on an award of 2.5 million or cited any authority in support of the said sum nor did the trial court cite any authority it relied upon in support of the sum of Kshs. 2.5 million that was awarded.

14. It is not open to the Respondent to rationalize the award of Kshs. 2.5 million by citing cases that were not availed to the trial court for the reason that the duty of this court, on appeal, is to re-evaluate the evidence as adduced, and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**).

15. Against this background, I find that the award of Kshs. 2.5 million was based on no evidence. I am persuaded that the parameters applied by the Learned Trial Magistrate in assessing damages for loss of dependency occasioned an excessive and inordinately high quantum and hence it is necessary to interfere with the said award.

16. Doing the best I can and in view of the authorities cited at the trial, the appeal succeeds. It is therefore hereby ordered:

**1) The sum of Kshs. Kshs. 2.5 million awarded for loss of dependency is set aside and substituted with an award for Kshs. 500,000/-**

**2) Special damages, damages for pain and suffering and Loss of expectation of life shall remain as awarded by the trial court**

**3) Each party shall bear its own costs of this appeal but the Respondent will bear costs of the trial in the magistrate's court.**

**DATED AT MERU THIS 20<sup>th</sup> DAY OF May 2021**

**T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Appellant - N/A for Mithega & Kariuki Advocates**

**For Respondents - Mr. Kaberia for Ms. Nkunja Kaberia & Co. Advocates**