



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. E007 OF 2020**

**RETCO EAST AFRICA LIMITED.....APPELLANT**

**-VERSUS-**

**JOSEPHINE KWAMBOKA NYACHAKI & FRANCIS MORURI NYACHAKI**

**(Suing as the Personal Representatives and Legal Administrators of the**

**estate of EVANS MICHIEKA NYACHAKI (Deceased).....RESPONDENTS**

**{Being an Appeal from the judgment of the Honourable M. O. WAMBANI (Mrs.) -**

**Chief Magistrate Nyamira dated and delivered on the 17<sup>th</sup> day of November 2020**

**in the original Nyamira Chief Magistrate's Court Civil Case NO. 135 OF 2017}**

**JUDGEMENT**

This appeal challenges the quantum of damages awarded to the Respondents as a result of an accident that occurred on 7<sup>th</sup> April, 2017 along Nyamira-Kisii road at Omogonchoro area in which the deceased **EVANS MICHIEKA NYACHAKI** suffered fatal injuries. The Appeal is premised on grounds that;

- “1. The quantum of general damages in respect of lost dependency is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice.**
- 2. The Learned Trial Magistrate ignored and/or paid lip service to the Appellant's submissions and especially the precedents cited therein.**
- 3. The Learned Trial Magistrate erred in law and fact entering judgment for pain and suffering without considering the applicable principles as established by precedent cited to her, considering the said precedents and thereby making awards under the said head which was so high as to amount to an error in law in this particular case.**
- 4. The Learned Trial Magistrate erred in law when she held without any reference to any precedent or legal basis that the multiplier applicable was 37 years and then proceeding to award damages on the basis of that arbitrary multiplier.**
- 5. The Learned Trial Magistrate erred in law and in fact in reaching a multiplicand of Kshs. 20,000/= without considering the evidence before her and without any reference to any precedent or legal basis and thereby making an award which was so high as to amount to an error in law in this particular case.”**

The appeal was canvassed by way of written submissions.

**Appellant's Submissions**

On the damages for pain and suffering, the appellant submitted that the deceased died on the same day of the accident; that he was pronounced dead on arrival at Ram Hospital. He submitted that the trial court awarded **Kshs.100, 000** for pain and suffering without considering the appellant's submissions and the authorities cited therein. He relied on a number of cases for the proposition that it would be

an improper use of a court's discretion to make an award without reference to the cited cases. Counsel prayed that the award under this head be substituted with **Kshs.10, 000/=** and cited four cases where a similar amount was awarded;

- **Eldoret HCCA 163/2011, Suluenta Kennedy Sita & Another v Jeremiah Ruto [2017] eKLR.**
- **Garissa High Court Civil Appeal NO. 10 OF 2014 Hassan Salat Gudow (Suing as Legal Representative of the Estate of Ali Hassan Salat) v Mohamed Adan & 2 Others [2015] eKLR**
- **Kisii Civil Case No. 229 Of 2010 Samwel Kimtai Koriri (Suing as Personal and Legal Representative of Estate of Chelangat Silevia v Nyanchwa Adventist Secondary School & Another [2016] eKLR.**
- **Eldoret Civil Appeal No. 98 of 2010 William Kinyanjui & another (Suing as the Legal Representatives of the Estate of Jane Florence Njeri Kinyanjui (Deceased) v Benard M. Wanjala & Another [2015] eKLR.**

On the award under the Fatal Accidents Act and more specifically the multiplier, Counsel submitted that at the material time the deceased was 23 years as proved by the death certificate produced in evidence and that the trial Magistrate ignored a cardinal principle in the assessment of damages that comparable injuries should as far as possible be compensated by comparable awards and hence reached an award that was unjust, inordinately high and unfair. Counsel contended that the trial Magistrate did not also consider the appellant's submissions and authorities on this issue and thereby made an error of misdirection for which this court should interfere. Counsel submitted that a multiplier of 20 years was more reasonable. He relied on the following cases:-

- **Kerugoya HCCA No. 23 Of 2016, Ireri Moses v Peter Mutugi Muthike (Suing as the Legal Administrators of the Estate of the Late Mary Njeri Muthike [2019] eKLR.**
- **Nakuru HCC No. 110 Of 2004, Daniel Mugaru Kuria v Geoffrey Githeki Macharia & Another [2006] eKLR.**
- **Machakos HCCA No. 113 Of 2006, Ramesh R. Vaya & another v Hiten Z. Limbani [2015] eKLR.**
- **Eldoret HCCC No.111 Of 2008, Achuma Chrombeiyee & Another V Moses Shivachi [2019] eKLR.**
- **Nakuru HCCA No. 76 of 1999, Julius Mokuva Ongera v Esther Njoki Gicharu [2006] eKLR.**
- **Nairobi HCC No. 1615 Of 2001, Satwinder Singh Bhogal v Satwinder Kaur Benawra & 2 others [2004] eKLR.**

Concerning the multiplicand, Counsel submitted that the trial court adopted **Kshs.20, 000/=** without analyzing evidence before it and without considering the appellant's submissions. Counsel relied on a number of cases for the proposition that it was an error for the trial court not to consider his submissions. Counsel further submitted that the respondents did not prove that the deceased was a boda boda rider as claimed or that he used to earn **Kshs. 20,000/=** per month and urged this court to adopt the minimum wage which at the time amounted to **Kshs. 5,844/=** as per the **Regulation of Wages 9 (General) (Amendment) Order 2015**.

### **The Respondents' Submissions**

The respondents on the other hand urged this court to uphold the award for pain and suffering and loss of amenities. Counsel for the respondents submitted that the appellant had relied on cases where the deceased persons died immediately after the accident yet in this case, the deceased died after 30 minutes. To support his submission Counsel relied on the case of **David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau [2016] eKLR**, where the court awarded **Kshs. 100,000/=** in respect of a deceased who died 30 minutes after the accident.

On the issue of loss of expectation of life, Counsel for the respondents submitted that the award of **Kshs.150, 000/=** was reasonable and that the appellant had not contested the award in this appeal.

On the multiplicand, Counsel submitted that the respondents tendered evidence that the deceased was 23 years old and a rider earning Kshs. 20,000/=. Counsel relied on the case of **Mombasa CA No. 317 of 2003 Checkers Trading Ltd & another v Fatuma Kimanthi & another** and the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** to support his submission that it is not only documentary evidence that can prove earnings. Counsel submitted that the award of **Kshs. 20,000/=** should be upheld as the deceased earnings were proved through evidence and on the basis of the persuasive authorities. Counsel for the respondents also urged this court to uphold the multiplier of 37 years adopted by the trial court. Counsel contended that as the deceased was 23 years he would have worked for a further 37 years noting that people who work in the informal sector tend to work for longer than those in the formal sector. Counsel cited the case of **Susan Wanjugu Muchemi v James Kabathi Mwangi [2005] eKLR** where the court adopted a multiplier of 26 years for a deceased aged 29. Counsel for the respondents further urged this court to uphold the dependency ratio adopted by the trial court, the special damages and the apportionment of liability as the same were not contested.

Lastly, on whether the appellant's submissions and precedents were considered, Counsel for the respondents submitted that the trial court considered the evidence adduced, the circumstances of the case and other decided cases in arriving at her reasoned decision. Counsel urged this court to uphold the trial court's judgment and submitted that the trial Magistrate exercised her discretion properly.

This being a first appeal, it is the duty of this court to re-consider, re-evaluate and re-analyze the evidence afresh and come to its own conclusion. It is also not lost to this court that an appellate court can only interfere with an award of a trial court where the appellant demonstrates that the award is so inordinately high or so inordinately low as to amount to an erroneous assessment of the damage, or that in coming to that assessment the trial court took into account an irrelevant fact or that it failed to take into account a relevant fact. The above principles were reiterated in the case of **Mbogo & another v Shah [1968] EA 93**, where it was held at page 96 that: -

**“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not**

**interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”**

Having carefully reconsidered and evaluated the evidence before the trial court I make findings as follows: -

### **Pain and Suffering**

The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of **Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR**, the court observed: -

**“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”**

**I have considered the cases relied on by the parties herein.** In this case where the deceased died 30 minutes after the accident an award of **Kshs. 100,000/=** for pain and suffering is not only fair but reasonable as the court is also enjoined to consider passage of time and inflation. **Kshs. 10,000/=** proposed by the appellant is what was awarded in the eighties and the nineties. The award under that head is upheld.

### **Multiplicand**

In their submissions, the respondents submitted that they adduced evidence at the trial court that the deceased was 23 years old and a rider earning Kshs. 20,000/=. They relied on the case of **Mombasa CA No. 317 of 2003 Checkers Trading Ltd & Another v Fatuma Kimanthi & another** and the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** for the proposition that it is not only documentary evidence that can prove earnings. I have considered the evidence by the deceased’s mother who testified that the deceased used to run a boda boda transport business prior to his death and was earning a monthly income of **Kshs. 20,000/=**. During cross-examination, she stated that she did not have the deceased’s M-pesa statement and hence had no way of proving his earnings. A boda boda rider’s wage if not known, can be discerned from the law and the approach by courts has been to resort to the minimum wage prevailing at the time of the deceased’s death. I am persuaded that the trial magistrate acted on a wrong principle by adopting a multiplicand of **Kshs.20, 000/=** when the same was not proven. In my considered view, the trial magistrate should have resorted to the minimum wage as is the practice. I accept the multiplicand of Kshs. 5,744.20/= proposed by counsel for the Appellant as the same is the applicable minimum wage as per the **Legal Notice No.117 of 2015, THE REGULATION OF WAGES (GENERAL)(AMENDMENT) ORDER 2015**. I rely on the Court of Appeal decision in the case of **Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga [2020] eKLR** where the minimum wage was adopted as a multiplicand.

### **Multiplier**

I have considered the rival submissions and the cases cited on this issue. The respondents relied on the case of **Susan Wanjugu Muchemi v James Kabathi Mwangi [2005] eKLR** where the court adopted a multiplier of 26 years for a deceased aged 29 years. The appellant on the other hand cited cases where a multiplier of between 15 to 20 years was adopted for a similar age. It is my finding that the multiplier of 37 years adopted by the trial Magistrate did not take into account other similar cases and that she therefore misdirected herself. In my view, considering the cases cited by both sides a multiplier of 27 years would be more reasonable and I hereby adopt the same.

### **Special damages and damages for loss of expectation of life**

These shall remain undisturbed as they were not contested. This also applies to the dependency ratio and the apportionment of liability.

On whether the trial court considered the appellant’s submissions and the evidence before it, I note that at page 12 paragraph 5 of the judgement the Learned Magistrate observed as follows: -

**“The Defendants submissions are dated 29<sup>th</sup> /10/2020 and filed in court on the 3<sup>rd</sup> /11/2020. The gist of the Defendant’s submissions is that the Plaintiffs be awarded Kshs. 10,000/= for pain and suffering, for loss of dependency the Plaintiffs be awarded Kshs. 467,520/=...that is a brief outline of the parties’ premises. The court has considered the parties’ premises, each in its entirety....”**

It is therefore my finding that the trial court considered the submissions by both parties and the evidence on record and analyzed the evidence in light of the law and in each finding gave a justification for the same. That ground of appeal cannot therefore hold. Accordingly, this appeal succeeds only to the extent afore-stated and judgement for the appellant against the respondents shall now be as follows: -

- i. Liability at 50%:50%**
- ii. Pain and suffering                      Kshs. 100,000/=**
- iii. Loss of expectation of life        Kshs. 150,000/=**

iv. Loss of dependency (5844.20 x 1/3 x 27 x 12)	Kshs. 631,173.6/=
v. Special damages	Kshs. 97,950/=
vi. Sub-total	Kshs. 979,123.6/=
vii. Less 50%	<u>(Kshs. 489,561.8)</u>
viii. Total	<u>Kshs. 489,561.8/=</u>

The Appellant has succeeded partially and hence shall have half the costs of this appeal. It is so ordered.

**JUDGEMENT SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 24<sup>TH</sup> DAY OF JUNE 2021.**

**E. N. MAINA**

**JUDGE**