



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 69 OF 2017**

**(Being an appeal from the original judgment and decree of Hon. JA Owiti, Senior Principal Magistrate, of 5<sup>th</sup> June 2017, in Vihiga PMCCC No. 97 of 2013)**

**MARY ISIGI ADAJI (suing for and on**

**behalf of the estate of**

**the late KEFA ADAJI).....APPELLANT**

**VERSUS**

**JAMES MOTANYA NYABOCHUA.....RESPONDENT**

**JUDGMENT**

1. The suit at the primary court, in Vihiga PMCCC No. 97 of 2013, was initiated by the appellant herein against the respondent, for general and special damages, arising from a road traffic accident on 25<sup>th</sup> February 2010, where a motor vehicle, belonging to the respondent, hit the deceased, who was a pedal cyclist along the Kakamega-Kisumu Road, causing his death. The appellant attributed negligence on of the respondent, and sought damages for fatal injuries and loss of life.

2. The respondent filed a defence, in which he denied liability and accused the deceased of being the sole cause of the accident or having contributed to it.

3. At the oral hearing 4 witnesses for the appellant testified. The appellant, PW1, adopted her written statement, where she described the deceased as her husband, and attributed negligence on the respondent. PW2, John Mudega Misigo Nyamweya, also relied on his written statement, and so did PW3, John Maeno Mudego. The statements they were referring to were recorded and signed by persons known as John Mudega and John Lomwenyo Misigo. I do not know whether the makers of these two statements were the persons who attended court and testified as PW2 and PW3. I have serious doubts. Anyway, both testified that they were at the scene of the accident, on the opposite side of the road, when they noticed the deceased cyclist being hit by a car that was being driven at high speed. None of them identified the accident car in their statements, and at the hearing none could remember the date of the accident, nor mentioned the registration details of the accident car. PW4, Police Corporal Vincent Obare, was not the investigator of the accident, but produced the police abstract, and identified the accident vehicle as KAN 112S. The defence closed without calling evidence.

4. After reviewing the evidence adduced at the trial, and other material on record, the trial court found the respondent liable, and awarded damages as follows:

(a) Pain and suffering .....Kshs. 10, 000.00;

(b) Loss of expectation of life.....Kshs. 100, 000.00;

(c) Loss of dependency.....(Kshs. 44, 000.00);

TOTAL Kshs. 154, 000.00

Less Kshs. 44, 000.00

NET TOTAL Kshs. 110, 000.00

5. Curiously, the trial court identified the accident vehicle as KAM 421, as pleaded in the plaint dated 31<sup>st</sup> October 2013, and filed in court on 4<sup>th</sup> November 2013. That pleading was no longer in place as at the date of the judgment, for the plaint had been amended on 1<sup>st</sup> September 2015, to refer to KAN 112S instead.

6. The appellant was aggrieved by the decision, and lodged this appeal. Her case, as articulated in her memorandum of appeal, dated 27<sup>th</sup> June 2017, is that the trial court awarded damages that were inordinately low in the circumstances, and wrongfully dismissed the claim under the Fatal Accidents Act, Cap 32, Laws of Kenya.

7. Directions were taken on 24<sup>th</sup> September 2018, for disposal of the appeal by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

8. The appellant's written submissions are dated 27<sup>th</sup> November 2020. On ground 1, on pain and suffering, it is submitted that a sum of Kshs. 50, 000.00 was ideal, and reliance is placed on the decision in *Sukari Industries Limited vs. Clyde Machimbo Juma* [2016] eKLR (Majanja J). On ground 2, it is submitted that an African man was expected to provide for his family, and, therefore, some provision ought to be made for loss of dependency. On the dependency ratio, it is submitted that 2/3 of the income was ideal. On the multiplier, the appellant pleads for 9 years. There is reliance on *Chania Shuttle vs. Mary Mumbi* [2017] eKLR (Kamau J), *Gordon Ouma Sunda & another vs. Adan Abdikadir Omar & another* [2019] eKLR (Cherere J) and *Priscilla Mwithimba vs. Simon Kaibunga & another* [2018] eKLR (Mabeya J).

9. The respondent did not file any written submissions.

10. For pain and suffering, I agree entirely with *Sukari Industries Limited vs. Clyde Machimbo Juma* [2016] eKLR (Majanja J). The figures the courts have been awarding for the last 20 years range between Kshs. 10, 000.00 and Kshs. 100, 000.00. Kshs. 10, 000.00 is usually awarded where the deceased died instantly, for he would be deemed to have had suffered no pain or minimal pain; while the higher figure would be awarded where death set in after some time. From the recorded evidence, it is not clear whether the deceased died instantly or not. Due to that gap, I believe the best award should have been Kshs. 50, 000.00 for pain and suffering.

11. On the compensation under the Fatal Accidents Act, the appellant raises two principal arguments. The first relates to the ratio of dependency. I have looked at the authorities cited, and others, including *Attorney General vs. Savinah Francis (suing as the personal representative of the Estate of Peter Musee Muema) & another* [2020] eKLR (Ong'udi J) and *Dismas Muhami Wainarua vs. Sapon Kasirimo Maranta (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased))* [2021] eKLR (Mwita J), where it was said that the dependency ratio should be lower where the deceased was unmarried, and where he was married and had children it ought to be higher, and I, therefore, find and hold that the dependency ratio adopted of 1/3 for loss of dependency was on the lower side, the trial court should have calculated the same on the basis of 2/3. The second relates to the multiplier. The trial court adopted one of 2 years for a 58-year-old. In *Chania Shuttle vs. Mary Mumbi* [2017] eKLR (Kamau J), the court had adopted 9 years for a 56-year-old and in *Midland Media Limited & another vs. Pauline Naukot Aule (Suing as the Legal Representative of the Estate of the late Esinyon Esokon Ekai)* [2020] eKLR (J. Mulwa J) the court, worked with 10 years for a 57-year-old. The multiplier of 2 adopted by the trial court was clearly on the lower side, and I would adopt the 9 years proposed by the appellant.

12. In view of the above, I hereby set aside the judgment of the trial court on the award of general damages of Kshs. 110, 000.00 and substitute the same with an award of Kshs. 546, 000.00, calculated as follows:

(a) Pain and suffering Kshs. 50, 000.00;

(b) Loss of expectation of life Kshs. 100, 000;

(c) Loss of dependency Kshs. 396, 000, tabulated as follows:

$(5500 \times 12 \times 2/3 \times 9)$

13. I shall not subject the same to deduction, based on the pronouncement by the Court of Appeal, in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased)) vs. Kiarie Shoe Stores Limited* [2015] eKLR (**Waki, Nambuye & Kiage, JJA**). After all, the compensation for pain and suffering, and the loss of expectation of life, are to the estate itself, for the loss suffered by the deceased personally, will loss of dependency is loss suffered, not by the estate or the deceased himself., but by the dependants on account of the death.

14. The appeal is disposed of in those terms. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6<sup>th</sup> DAY OF AUGUST 2021**

**W. MUSYOKA**

**JUDGE**