



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO 79 OF 2020 (E025 OF 2020)**

**CHINA HENAN INTERNATIONAL CO-OPERATION LTD.....APPELLANT**

**VERSUS**

**LINET MWANGO NYABARO & DUNCAN GETUNGI NYABARO**

**(Suing as the legal representatives of the Estate of)**

**NAHSON NYABARO NYANDEGA.....RESPONDENT**

*(Being an appeal and Judgment of the Honourable Chief Magistrate*

*Hon. Nathan Shiundu Lutta delivered on 25<sup>th</sup> December 2020*

*in Kisii CMCC No 209 of 2019)*

**JUDGMENT**

1. This appeal was filed by the Appellant solely challenging the award of damages. The fact that an accident took place and NAHSON NYABARO NYANDEGA (*the deceased*) died is not in dispute. The issue of liability was agreed at 70:30 against the appellant on the 6/10/2020. The respondents were awarded the following damages:

**AMOUNT (KSHS)**

Pain and Suffering	50,000
Loss of expectation of life	50,000
Loss of dependency	5,400,000 [50,000 X 12 X 15 X 2/3]
Special Damages	223,000
Less 30% contribution	
<b>TOTAL</b>	<b><u>3,901,100/-</u></b>

2. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the 14<sup>th</sup> December 2020. The appeal is mainly on the trial court's finding on quantum on the following grounds:

1. THAT the learned trial magistrate erred in law and in fact by awarding general damages that were manifestly excessive and undeserved general damages to the respondent under the Fatal Accident Act.
2. THAT the learned trial magistrate erred in both the law and in fact in suing a multiplier of 15 years where the deceased was 50 years.

3. THAT the trial magistrate erred in law and in fact by using Kshs 50,000 as monthly earnings when proof of the same was never produced.

4. THAT the trial magistrate erred in fact and in law in failing to consider the appellants submissions on quantum.

5. THAT the trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

3. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

4. In seeking to set aside the decision of the trial court, the appellant submitted that it is not clear how the trial court came to the conclusion that Kshs 50,000/- was the deceased's monthly earnings. It was advanced that there were no receipts produced showing the deceased's monthly earnings. It was further submitted that the respondent did not produce any tax returns or bank deposit slips or any books of record indicating that the deceased used to earn Kshs 50,000/-. The appellant argues that the nature of the deceased's business was never disclosed. It was submitted that in the absence of proof of income the trial court ought to have considered the deceased as a general laborer as per the regulation of wages. It was proposed that Kshs 5,000/- would have been the monthly earning according to the **Regulation of Wages 2013** or Kshs 7,240.92/- as per the **Regulations of Wages (General) (Amendment) Order 2018**.

5. The appellant further contends that since the deceased was 50 years, the appropriate multiplier would be 8 years. It cited the case of **EMK & Another v EOO [2018] eKLR** in support of its case. It was submitted that in any event the respondent never stated that the deceased was in good health. The appellant urged the court to set aside the trial court's award and consider their proposal of Kshs 639,100/- as the appropriate award for damages.

6. On the other hand, the respondent contends that there was evidence that the deceased had several *matatus* and was also running a hotel business and therefore earned Kshs 100,000/- to support his family. They cited the case of **Jacob Ayiga v Simon Obayo (2005) eKLR** where the court rejected that the contention that only documentary evidence can prove a person's profession and his earnings. They relied on the case of **Joseph Mwangi Wanyeki v Alex Muriithi Mucoki & Another [2019] eKLR**.

7. The respondents supported the multiplier of 15 years applied by the trial magistrate. They argued that the deceased was not in formal employment and would have done his business even beyond the age of 70 years.

8. It was further submitted that the dependency ration of 2/3 was also appropriate because the deceased was the sole breadwinner and most of his children were still in school. They advanced that the special damages awarded were specifically pleaded and proved. The respondent urged the court to hold the finding of the trial court.

#### **ANALYSIS AND DETERMINATION**

9. The factors under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** as follows:

*'An appellate court will not disturb an award for general 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 so arrived at a figure which was either inordinately high or low...'*

10. The appellant has not challenged the award of the Ksh. 50,000/- for loss of expectation of life and pain and suffering at Ksh. 50,000/- awarded by the trial court. The two issues for determination is whether the awards of Kshs 5,350,000/- for general damages under the Fatal Accidents Act were excessive and whether the award of Kshs 223,000 awarded as special damages was proved.

11. The manner of assessment of damages under the Act was concisely put by Ringera J., in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where he stated as follows;

*"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."*

12. The trial magistrate in applying the multiplicand of Kshs 50,000/- found that the deceased received income as business man and that it was proved through the receipts given in court that his income was subject to statutory deductions. Having carefully looked at the exhibits produced by the respondents, there were no such receipts tendered to show how much the deceased was making or any statutory deductions that were made and to this extent only, I must fault the trial magistrate's holding.

13. The Court of Appeal in **Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga [2020] eKLR** observed that:

*In our view, there was sufficient evidence that the deceased was a business lady. All that was required of the court was to assess the net income of the deceased, given the business enterprise that she was undertaking and the evidence that was available before the*

court.

31. In **Jacob Ayiga Maruja & Anor vs. Simeon Obayo** [2005] eKLR, this Court dealing with a similar situation in which a plaintiff had no documentary proof of the deceased's earning, stated as follows:

***“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”***

32. We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.

33. ....

34. We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the deceased's account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased.

14. In this case the respondent testified that the deceased was the owner of motor vehicle KBN 579W which he used for his *matatu* business. In addition to his *matatu* business, the deceased operated a hotel business under the name 'Suneka Best Hotel' the respondents produced the business permit that had been issued to the deceased on 16<sup>th</sup> April 2018 by the county government of Kisii. The appellant contends that in the absence of proof of the deceased's earning/income the court has to revert to the basic wages in terms of the Regulations of Wages (General/ Amendment) Order. That the applicable category ought to have been General laborer as per the Regulation of Wages Order and that since the deceased hailed from Suneka the applicable category ought to have been a General laborer and the applicable column therein being Column 4 for "All other areas" as the deceased was not living within the municipality. It was proposed that the court adopts the Regulation of Wages (General) (Amendment) Order 2018 where a general laborer's earning from other areas is pegged at Kshs. 7,240.95. The respondent submitted that the amount of Kshs. 50,000/- was not excessive and that Pw1 produced documents which confirm that the deceased owned several *matatus* which were involved in public transport and that the deceased had a hotel business. A hotel business must have some record of income of the sales done and a *matatu* business some daily income and a record of income received. The said records could have enabled the trial court to arrive at a monthly income. No evidence was adduced by the respondent to show the income the deceased received from the said businesses. It is also not clear how the trial magistrate arrived at the sum of Kshs. 50,000/-. In the case of *Jacob Ayiga Maruja vs. Simeon Obayo* (supra), the Court of appeal observed that there was sufficient evidence from the respondent. The deceased in the said case was a carpenter, the deceased in this case had a hotel business and *matatu* business. Even though the appellant did not adduce any evidence the burden is always on the plaintiff to prove his or her case on a balance of probabilities. In the absence of the said evidence what then is the respondent entitled to? I am in agreeable with the appellant that in the absence of any evidence to show the monthly income the deceased earned from his business the court is guided by the Regulation of Wages Order. The deceased died in 2018. Pw1 said the deceased was managing the hotel. The business permit produced dated 16<sup>th</sup> April 2018 indicates that he was the holder of a single business permit and the activity allowed was "*medium eating house snack bar, tea house, hotel no lodging no alcohol service between 8-20 customers*". Fee paid was Kshs. 5,000/-. Going by the Regulation of Wages Order the deceased work falls under the category of General worker. With a business in *Suneka* the monthly income as provided in the Order is Kshs. 7,240.95. This is the sum the respondent is entitled to.

15. It is not disputed that the deceased was a family man with wife and children who depended on him. I find no fault with the trial court's finding in applying the ratio of 2/3 as part of income deceased was using to maintain his family.

16. I now turn to consider the multiplier adopted by the trial magistrate. The appellants submitted that the trial court was at fault for noting that the deceased was 50 years old as at the time of death and proceeding to award a multiplier of 15 years. According to the appellant, a multiplier of 8 years was more appropriate. In the **Isaack Kimani Kanyagi case** (supra) the court of appeal held that:

***“...the deceased was a self-employed person and the government retirement age was irrelevant to her business. Her ability to continue in business depended on her good health and there was no evidence that she had any health problems that could have made it impossible for her to continue with her business well beyond the age of 60 years. We find that a multiplier of 15 years would have been fair and reasonable taking into account the deceased's age and the vagaries and uncertainty of life.”***

17. The deceased being a business man and in good health could well carry with his business beyond the retirement age. In the circumstance, I am counterstained to agree with the finding of the trial magistrate on the 15 years multiplier.

18. I now turn to consider whether the plaintiff pleaded and proved that they were entitled to special damages. It is now settled that the bereaved family may not keep proper records of the funeral expenses incurred following the death of the deceased. The Court of Appeal in **Premier Diary Limited v Amarjit Singh Sagoo & another** [2013] eKLR held that:

***“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a***

bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

19. In this case however, the respondent presented before the trial court receipts totaling to Kshs 203,000/- in regard to funeral related expenses and a receipt of Kshs 20,000/- issued by their advocate for the services rendered in obtaining grant for letters of administration. The trial magistrate can therefore not be faulted for awarding the respondent Kshs 223,000/- on the head of special damages.

20. The pain and suffering and the other heads taken into account by the trial court fitted well with the circumstances as well as the age of the deceased and his occupation.

21. The trial court in its computation of damages made a deduction of the award made under Law Reform Act from the Fatal Accident Act. The Court of Appeal in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v. Lubia & Another (No. 2) [1987] KLR 30** had this to state on the issue:

“6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

7. The Law Reform Act (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words "to be taken into account" and "to be deducted" are two different things. The words used in section 4(2) of the Fatal Accidents Act are "taken into account". The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

22. The trial court thus fell into error when it deducted the award under the **Law Reform Act** from the **Fatal Accident Act**.

23. With the above finding the respondent is entitled to the sums indicated below:

<b>AMOUNT (KSHS)</b>	
Pain and Suffering	50,000
Loss of expectation of life	50,000
Loss of dependency	868914 [7240.95 X 12 X 15 X 2/3]
Special Damages	223,000
Less 30% contribution	
<b>TOTAL</b>	<b>834339.80</b>

24. In conclusion, the appeal is allowed the award of Kshs. 3,901,100.00 is set aside and substituted with a sum of 834,339.30,6 thus I enter judgment for the Respondent in the sum of Kshs. 834,339.80, costs of the appeal is awarded to the appellant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21ST OCTOBER 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Miss Anyango For the Appellant**

**Miss Kusa For the Respondent**

**Ms. Rael Court Assistant**