



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO. E016 OF 2020**

**BETWEEN**

**WILTON ASUBA MALIKA .....1<sup>ST</sup> APPELLANT**

**OPPORTUNITY INTERNATIONAL WEDCO LTD .....2<sup>ND</sup> APPELLANT**

**AND**

**1. MONICA ATIENO ODHIAMBO**

**2. JOSHUA OUMA ADOYO (Suing as legal representatives of the estate of**

**Geoffrey Odhiambo Ouma-deceased).....RESPONDENTS**

*(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's PMCC No. 139 of 2019 by Hon. Celesa Okore – Senior Resident Magistrate).*

**JUDGMENT**

1. Wilton Asuba Malika and Opportunity International Wedco Ltd, the appellants, were the defendants in Oyugis Principal Magistrate's PMCC No. 142 of 2019 where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KCC 897P and the deceased. The deceased was a cyclist who was knocked down by the said vehicle. He sustained fatal injuries. The respondents sued on behalf of the estate of the deceased and were awarded Kshs. 3,720,000/= general damages and Kshs. 55,000/=.

2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Okongó Wandago & Company Advocates. They raised the following grounds of appeal:

a) That the Learned trial magistrate grossly misdirected herself in treating the evidence and the submissions on quantum before her superficially and consequentially coming to a wrong conclusion on the same.

b) That the learned trial magistrate erred in law and in fact when she used her discretion wrongly in awarding excessing damages in the circumstances and in failing to consider the fact that no evidence was led before her on the basis of which such an award could be found.

c) That the learned trial magistrate erred both in law and in fact when she assessed damages under the law Reform Act viz. loss of dependency by adopting a multiplicand of kshs.15,000/- with a multiplier of 30 years thereby awarding the respondent kshs.3,600,000/- which award was so inordinately high, unmerited, disproportionate, excessive and unreasonable.

d) That the learned trial magistrate misapprehended the evidence and misapplied, ignored and or overlooked the correct legal principles and judicial precedent and submissions by the appellant that she made an award under the law Reform Act and the Fatal Accidents Act, that was inordinately high hence an erroneous estimate of damages which the deceased and his estate suffered.

e) That the trial magistrate erred in law and fact in failing to discount the awards under the law reform act from the ultimate award thereby making a double award to the respondents who were both legal representatives of the estate of the deceased and dependents of the deceased.

3. The appeal was opposed by the respondents through the firm of Nyatundo & Company Advocates. The respondent contended that the decision was well founded on evidence and the law.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

**...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 so arrived a figure which was either inordinately high or low.**

6. It was contended by the appellants that a multiplicand of kshs.15, 000/= with a multiplier of 30 years was erroneous. At the time of his death the deceased herein was aged 19 years. He was said to have been a boda-boda rider and said to earn Kshs. 1,500/= per day. There was no documentary evidence to support the claim. Without evidence to support the claim, the learned trial magistrate erred in adopting a multiplicand of kshs.15, 000/=. The best approach in such a case is to use the prevailing minimum wage for unskilled labour at the time of the accident. The Regulation of Wages (General) (Amendment) Order, 2013 gives Kshs.5, 218 as the minimum wage for general labourer. The award under the head of dependency will be as follows:  $5,218 \times 12 \times 30 \times \frac{2}{3} = 1, 252 320$ .

7. It is trite law that where an award has been made under the Law Reform Act and Fatal Accidents Act and beneficiaries are the same, the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. The Court of Appeal in the case of **Kemfro vs. A. M. Lubia & Another [1982-1988] KAR 727** as follows:

**The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.**

In the instant case, the learned trial magistrate ought to have discounted the award of loss of expectation of life under the Law Reform Act.

8. I therefore set aside the award by the learned trial magistrate and substitute it with the following award:

a) Pain and suffering	Kshs. 20,000.00
b) Loss of expectation of life	Kshs. 100,000.00
c) Loss of dependency	Kshs. 1, 252 320.00
d) Subtotal	Kshs. 1,372,320.00

Less damages under the Law Reform Act. Kshs. 120,000.00

(1,252,320)

Less 20% contributory damages (1,252,320 -250, 464)

The total award on the head of general damages is therefore substituted with a figure of Kshs. 1,001, 856.00. To that extent the appeal succeeds with half the costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF NOVEMBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**