



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 147 OF 2018**

***(An appeal arising from the judgment and decree of the Hon. ML Nabibya, Senior Resident Magistrate (SRM), in Hamisi SRMCCC No. 6 of 2018 of 18<sup>th</sup> October 2018)***

**JJASM MINI DISTILLERY.....APPELLANT**

**VERSUS**

**SUSAN J. ADAGARA AND SIMON MBOGE (suing as the administrators and**

**personal representatives of the estate of DENNIS INDULAJI.....RESPONDENT**

**JUDGMENT**

1. The suit at the trial court was initiated by the respondents herein against the appellant, for general and special damages, arising from a motor traffic accident involving the deceased cyclist and a motor vehicle owned and controlled by the appellant. The appellant entered appearance and filed a defence, in which he denied liability and attributed negligence on the cyclist
2. The trial court heard three witnesses from the respondents' side and none from the appellant's side. The respondents stated that the cyclist was their son, and was knocked down by the appellant's vehicle. He was 21 years old, and they were his sole dependants. He earned Kshs. 30, 000.00 per month, and was in good health. They called a witness who said that he saw the vehicle knock down the cyclist. The vehicle veered off its lane and hit the cyclist. The last witness was a police officer, who testified that his investigations revealed that the appellant's driver was to blame for the accident.
3. The trial court apportioned liability at 100% against the appellant, loss of dependency at Kshs. 2, 520, 000.00, loss of expectation of life at Kshs. 150, 000.00, pain and suffering at Kshs. 100, 000.00 and specials at Kshs. 68, 960.00
4. The appellant was aggrieved by the decision and lodged this appeal. He has raised several grounds, that the multiplicand adopted by the court was not based on any evidence, that the dependency ratio adopted was erroneous, that the award of Kshs. 100, 000.00 for pain and suffering was excessive, that the multiplier of 35 years was without any basis and did not take into account the vicissitudes of life, that the award of loss of expectation of life was not deducted, and that the appellant's written submissions were disregarded.
5. Being the first appellate court, I am alive to the principles stated in *Ngigi Kuria & another vs. Thomas Ondili Oduol & another* [2019] eKLR and *Julius Vana Muthangya vs. Katuuni Mbila Nzai* [2019] eKLR, with regard to the duty of the court, to review the evidence afresh and with an open mind. See also *Selle & Another vs. Associated Motor Boat Co. Ltd & Another* [1968] EA 123.
6. On liability, the record is clear. The appellant did not lead any evidence, and the trial court was left only with the testimonies of an eyewitness and the police officer who investigated the matter. Their testimonies pointed to negligence on the part of the appellant. That evidence was not controverted. The trial court did not err in finding that the appellant was 100% liable.
7. On quantum, there is evidence that the cyclist died on the spot. His suffering was short and, therefore, the award made by the trial court of Kshs. 100, 000.00 was inordinately high. In *Acceler Global Logistics vs. Gladys Nasambu Waswa & another* [2020] eKLR, the court awarded Kshs. 50, 000.00 as compensation for pain and suffering for someone who died on the spot. An award of Kshs. 50, 000.00 under that heading would have been sufficient.
8. With regard to loss of expectation of life, the trial court awarded Kshs. 150, 000.00, the appellant submitted that Kshs. 80, 000.00 would have been adequate. In *Daniel Mwangi Kimemi & 2 others vs. JGM & another* [2016] eKLR, the court imposed Kshs. 100, 000.00 for loss of expectation of life in 2016, while in *Chhabhadiya Enterprise Ltd & another vs. Gladys Mutenyo Bitali (suing as administrator and personal representative of the Estate of Linet Simiyu – (deceased))* [2018] eKLR, the court awarded Kshs. 100, 000.00 for loss of expectation of life and in *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (deceased))* [2017] eKLR, the court awarded Kshs. 80, 000.00 for loss of expectation of life and in *Surjit Singh & another vs. Richard W. Barasa Bungoma High Court civil appeal number 78 of 2012*, the court, in 2017, awarded loss of loss of expectation of life at Kshs. 80, 000.00. An

award of Kshs. 100, 000.00 would have sufficed in the circumstances.

9. On loss of dependency, the arguments are that the multiplier, the multiplicand and the ratio of dependency adopted were wrong. On the multiplier, the respondents had claimed that the deceased made Kshs. 30, 000.00 monthly. There was no proof of that, and the trial court adopted Kshs. 9, 000.00. The appellant argued that the minimum wage of Kshs. 5, 436.34 should have been adopted instead. The Regulation of Wages (General) (Amendment) Order, 2015 Legal Notice 166 of 2015, prescribed Kshs. 5, 436.34 for unskilled labour. That should have been the figure adopted by the trial court as a multiplier. For a multiplicand, the trial court adopted 35 years, for a 21-year-old. In *YH Wholesalers Ltd & another vs. Joseph Kimani Kamau & another* [2017] eKLR, the court adopted a multiplicand of 30 years for a 21-year-old, while in *Victor Hosea Letting vs. Anwarali & Brothers Limited & another* [2019] eKLR the court adapted a multiplicand of 33 for a 21 years old. Consequently, it is my holding that the trial court did not make any error in that regard. On dependency ratio, the trial court worked with a ratio of 2/3, which was excessive, going by the principle stated in *H Young & Co. EA Limited vs. Lawrence Ayako Orero & another* [2019] eKLR, where a ratio of 1/3 was employed. That ought to have been the ratio the trial court should have adopted.

10. With regard to the award of damages under the Law Reform Act, Cap 26, Laws of Kenya, being deducted from the award under the Fatal Accidents Act, Cap 32, Laws of Kenya, it was stated in *Hellen Waruguru Waweru vs. Kiarie Stores Limited* [2015] eKLR, that there was no legal requirement for such deduction, and, therefore, the trial court did not err in failing to make the deduction.

11. On special damages, it is trite that special damages must not only be specifically pleaded, they must also be specifically proved. However, in *Premier Diary Limited vs. Amarjit Singh Sagoo & another* [2013] eKLR, *Capital Fish Kenya Limited vs. Kenya Power & Lighting Company Limited* [2016] eKLR and *JNK vs. Chairman Board of Governors* [2018] eKLR, the courts made a special case for burial expenses on grounds receipts may not always be available to support funeral expenses. In the instant case, the receipts were put in evidence, despite lacking the names of the respondents, without any objection from the appellants. Consequently, the trial court, similarly, did not fall into any error.

12. In the end, I do find that the appeal succeeds partially. The final award is revised as follows:

- (a) Pain and suffering .....Kshs. 50, 000.00;
- (b) Loss of excitation of life.....Kshs. 100, 000.00;
- (c) Loss of dependency .....  $35 \times \frac{1}{3} \times 5,434.34 \times 12 =$  Kshs. 760, 808.00
- (d) Special damages .....Kshs 68, 960.00

TOTAL Kshs. 910, 808.00.

13. The appeal herein is disposed of in the terms stated above. Each party shall bear their own costs of the appeal.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

**JUDGE**