



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 150 OF 2018**

**MUNYAO NDILI.....1<sup>ST</sup> APPELLANT**

**CHRISTINA MUTINDA NYALA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**LILIAN NDULUVE & BEATRICE WAUSI MWANIA**

*(suing as the legal representatives of the estate of)*

**GEOFFREY NDUNDA MULI.....RESPONDENTS**

*(An Appeal from the Judgment of Hon. C.O Nyawiri (SRM) in the Senior Resident Magistrate's Court at Makueni, Civil Case No.169 of 2015, delivered on 17<sup>th</sup> October 2018).*

**JUDGMENT**

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *Geoffrey Ndunda Muli* pursuant to a fatal road accident on 02/06/2014 (*material day*) along the Wote-Makindu road. They also prayed for special damages, costs of the suit and interest.

2. The Appellants filed a joint statement of defence denying the claim. The matter later proceeded for hearing and judgment was delivered on 17<sup>th</sup> October 2018. The learned trial Magistrate found the Appellants 100% liable and assessed damages as follows;

Pain & suffering.....Kshs.20,000/=

Loss of expectation of life.....Kshs.100,000/=

Loss of dependency.....Kshs.2,912,000/=

Special damages.....Kshs. 20,500/=

**Total.....Kshs. 3,052,000/=**

3. Aggrieved by the award, the Appellants through Muchui & co. advocates filed this appeal and listed 6 grounds as follows;

a) **That**, the learned trial Magistrate erred in law and fact by adopting as multiplicand an amount that was not pleaded by the plaintiffs in their amended plaint.

b) **That**, the learned trial Magistrate erred in law and fact by holding that the deceased operated a business earning Kshs.100,000/= per month which finding was not at all supported by the evidence adduced.

c) **That**, the learned trial Magistrate erred in law and fact by failing to appreciate that the evidence tendered only established a multiplicand of Kshs.82,000/=.

d) **That**, the learned trial Magistrate erred in law and fact by adopting Kshs.182,000/= thus including Kshs.100,000/= being income from the deceased's alleged business, in determining the multiplicand for purposes of computing general damages for loss of dependency while evidence adduced in court reflected that the estate did not lose income generated from the deceased's business as

it is an ongoing concern.

e) **That**, the learned trial Magistrate erred in law and fact by completely ignoring the Appellant's written submissions and authorities cited by the Appellants in determining the multiplicand.

f) **That**, the amount awarded to the Respondents as general damages for loss of dependency is so manifestly excessive and erroneous as to warrant disturbance on appeal.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. On ground (a), the Appellants fault the trial magistrate for veering off from the pleadings and considering, as multiplicand, an amount that was never pleaded. They urge this court to replace Kshs.182,000/- with Kshs.82,000/= which they submit was within the pleaded amount and was strictly proved. They rely *inter alia* on the case of **Raila Amolo Odinga & Anor. –vs- IEBC & 2 Others (2017) eKLR** where the Supreme Court held that;

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”*

6. On ground (b), they submit that ownership is a factual issue and the Respondents' averment that the deceased was a business owner ought to have been supported by production of registration of a business name in the name of the deceased. They contend that the business name registration certificate produced as evidence is registered in the name of one of the Respondents herein.

7. They also submit that the bank statements produced run from 01/02/2014 - 16/08/2014 yet the deceased died on 02/06/2014. They contend that this evidence established that the deceased was not the owner of the business and that business did not cease its operations due to the passing on of the deceased.

8. On grounds (c) & (d), they submit that the income pleaded was Kshs.131,374/= per month but the evidence adduced was that the deceased was an employee of NSSF earning a gross salary of Kshs.122,000/= and the payslip showed that the net salary was Kshs.82,000/=. They contend that there was no additional evidence showing that the deceased earned an additional income of Kshs.100,000/= *vide* a business he owned.

9. On grounds (e) & (f), they submit that the trial court ignored their submissions about the certificate of registration and bank statements hence arriving at an award for loss of dependency that is manifestly excessive and erroneous.

10. On ground (a), the Respondents submit that the additional income of Kshs.100,000/= was captured in the witness statement of Pw2. They also submit that Pw2 was not cross examined on whether the issue of additional income was supported by pleadings and there was no objection to production of documents in support of the same. They rely *inter alia* on the case of **Maurice O. Okuthe –vs- South Nyanza Sugar Co. Ltd (2019) eKLR** where the Court held that;

*“5. The starting point is the issue of limitation. I have confirmed that the issue was not raised in the suit. The issue is also not part of the grounds of appeal before this court. The issue was raised for the first time on appeal and through the Respondent's written submissions. The parties as well as the trial court did not therefore express themselves on it. Guided by the respective Supreme Court and Court of Appeal binding decisions in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** the issue of limitation, having not formed part of the suit by way of pleadings or otherwise, is a non-issue and cannot be raised for the first time on appeal. The issue is hereby dismissed. I must also clarify that my finding in **Kenindia Assurance Co. Ltd vs. Otieno, Ragot & Co. Advocates (2017) eKLR** is distinguishable. In the **Kenindia Assurance's** case I was dealing with a Reference/Appeal from the Taxing Officer where the issue of limitation had not been raised and dealt with before the Taxing Officer. The reason I decided to deal with the issue was that the Taxing Officer had no jurisdiction to determine such a substantive matter. The issue fell within the exclusive preserve of the High court. That is not the position herein. The trial court had jurisdiction to determine the issue of limitation and since the issue did not form part of the pleadings or proceedings before the trial court this court has no jurisdiction to entertain the same at an appellate level.”*

11. They also cited the case of **Kenya Ihenya Company Ltd & Another -vs- Njeri Kiriba [2019] eKLR** where the Court of Appeal held that;

*“26. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. See **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**. Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of **Odd Jobs vs. Mubia [1970] EA 476**. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say: -*

*“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this court is not as strict as appears to be that of courts in India. In East Africa the position is that a court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact*



- c) Elizabeth Musyawa Ndunda                      daughter    adult
- d) Nelly Mutuli Ndunda                              daughter    adult
- e) Juliana Minoos Ndunda                          daughter    adult
- f) Kamene Ndunda                                    daughter    adult
- g) Victor Muli Ndunda                                son            adult
- h) Irene Mbula Ndunda                              daughter    adult
- i) Pauline Kalondu Ndunda                         daughter    adult
- j) Stephen Kilonzo Ndunda                         son            adult
- k) Grace Muloi Ndunda                              daughter    adult

26. The learned trial Magistrate used a multiplicand of Kshs.182,000/= (82,000/= + 100,000/=) which is far much above the Kshs.131,374/= which had been pleaded by the Respondent. He could not give a figure that was higher than what had been pleaded without an amendment. This was an error which must be corrected. The multiplicand of Kshs.182,000/= is therefore set aside.

27. Coming to the business, Pw2 said the income from the business was Kshs.100,000/= considering what had been pleaded as the monthly earning of the deceased without mention of his NSSF employment the money from the business would be Kshs.131,374 – 82,000/= = Kshs.49,374/=. Was this proved?

28. To prove the business earnings Pw2 produced bank statements for the company from February 2014 – August 2014. The deceased died on 2<sup>nd</sup> April 2014. The company was according to Pw2’s evidence supplying books in school. this is what she said:

***“He used to do business also of supplying books in school and was earning about Kshs.100,000/= from the business.”***

29. It is not clear whether he was making Kshs.100,000/= per month. Can one give a fixed return for a business? Books in schools are not bought every month. Secondly, the deposits in the bank could be the gross earnings before the profits are determined. Pw2 did not talk of profits being made by the company. I have also seen the copies of the payslips produced herein. The gross salary of the deceased was Kshs.122,269/=. His net salary was Kshs.30,553 – Kshs.31,374/55. This means what he carried home from his job earnings was about Kshs.31,000/= per month.

30. From my re-evaluation of the evidence, the appropriate multiplicand should have been Kshs.100,000/=. Accordingly the loss of dependency is calculated at  $100 \times 12 \times 2 \times 2/3 = 1,600,000/=$ .

31. The net award should therefore be:

- Pain and suffering – Kshs.20,000/=
- Loss of expectation of life – Kshs.100,000/=
- Loss of dependency – Kshs.1,600,000/=
- Special damages – Kshs.20,500
- Total - Kshs.1,740,500/=**

32. The judgment entered on 17<sup>th</sup> October is hereby set aside and substituted with a judgment for Kshs.1,740,500/= (**One million, seven hundred and forty thousand, five hundred shillings only**). Plus, costs and interest.

(b) The Appellants will get half of the costs of the appeal.

**Delivered, signed & dated this 29<sup>th</sup> day of July 2020, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**