



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.3 OF 2017**

**OKEYO ADRIAN OMOLO..... APPELLANT**

**VERSUS**

**HENRY OKOTH .....RESPONDENT**

*(Being an appeal from original conviction and sentence in Civil case No.87 of 2015 of the Chief Magistrate's Court at Homabay dated 12/9/2017 by Hon. S. Ndegwa, PM)*

**JUDGMENT**

[1] Pursuant to the plaint filed on 3<sup>rd</sup> December, 2015 at the Magistrate's court Homabay in **CMCC No. 87 of 2015**, the appellants, **Okeyo Adrian Amolo** and **Michael Amolo**, were sued by the respondent; **Henry Okoth**, in his capacity as the legal representative of the state of the late **Teresa Achieng Nicholas(deceased)**, for damages arising from a road traffic accident which occurred along the Rodi-Kopany-Ndhiwa road on 10<sup>th</sup> February 2015, involving motor vehicle **Reg. No. KBN 355J Nissan X-Trail** belonging to the second appellant and driven at the time by the first appellant and in which the deceased was traveling as a lawful passenger.

[2] It was the respondent's contention that the said vehicle was on the material date driven by the first appellant so negligently and/or carelessly such that it rammed into a lorry **Reg.KBN 619F**, thereby occasioning fatal injuries to the deceased.

The respondent therefore prayed for general damages for pain and suffering, loss of dependency and loss of expectation of life as well as Special damages for expenses incurred as a result of the accident against they appellants as driver and owner respectively of the ill-fated vehicle.

[3] In their statement of defence filed on the 18<sup>th</sup> May 2016, the appellant's/defendants denied the entire claim by the respondent and contended that the alleged accident did not occur and if it did, that it was as a result of the negligence of the deceased and the driver of the lorry Reg. No.KBN 619F. They therefore prayed for the dismissal of the claim with costs.

[4] When the matter came up for hearing on 3<sup>rd</sup> October, 2016, the parties recorded a consent on liability to wit "By consent judgment be and is hereby entered against the defendant in the ratio of 30:70".

The hearing was therefore confined to the quantum of damages payable to the respondent.

In that regard, the respondent testified as **PW1** and produced necessary documentary evidence in support of the claim. The appellants did not testify not call any witness to do so. They purposely closed their case without availing any evidence.

[5] In its judgment, the trial court awarded damages to the respondent as follows:-

General damages -

(a) Pain and suffering - ksh.20,000/-

(b) Loss of expectation of life ksh.100,000/-

(c) Loss of dependency  $15 \times 2/3 \times 12 \times 35000$ - 4,200,000/-

TOTAL - KSH.4,320,000/-

Less 30% contribution - **ksh.4,284,000/-**.

- Special damages – ksh.128,000/-.

- GRAND TOTAL – **KSH.4,412,000/-**.

[6] Being dissatisfied with the award, the appellants filed the present appeal filed herein on 17<sup>th</sup> January 2017, by the firm of **Mose Mose & Milimo Advocates**.

The respondent opposed the appeal through the firm of **P.D. Onyango & Co. Advocates**.

The appeal proceeded by way of written submissions. Both parties filed their respective submissions.

[7] The duty of this court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (**see, Selle Associated Motor Boat Co. Ltd [1968]EA 123**). In that regard, the sole evidence of the respondent was meant to establish the parameters for the award of both general and special damages as the question of liability was settled by the consent judgment on liability.

[8] The respondent's evidence remained undisputed in establishing that the deceased was his wife. An affidavit of marriage was tendered in evidence (**PEx1**) and so was a grant of letters of administration issued to him vide a succession cause respecting the estate of his late wife(**PEx3**). Also produced was a police abstract report on the accident(**PEx.4**)

[9] The respondent stated that the deceased was a business lady as at the time of her demise. This was established by production of the necessary business permit(**PEx5**) and Income Tax returns. Her monthly earnings from the business was placed at kshs.50,000/- with which she assisted the respondent in the payment of school fees for their two adult children.

[10] On special damages, the respondent produced the necessary receipts(**PEx7**) which were not disputed by the appellants.

All the foregoing evidence was considered by the trial court which then rendered its impugned judgment based thereon.

On its own consideration of the evidence, this court would agree with the judgment in as much as it was based on undisputed facts and legal principles applicable in assessment of damages.

[11] This appeal is essentially on quantum of damages. In that regard, necessary guidelines was provided by the court of appeal in the famous case of **Kemfro Africa Ltd & Another Vs A.H. Lubia & Another(1982-88)1KAR 777**, where it was stated that:-

*“The principle to be considered by an appellant court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the court of Appeal for Eastern Africa to be that:- it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that shot of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.*

[12] Basically, as may be deciphered from the grounds of appeal, this appeal mainly turns on the award made to the respondent for loss of dependency and special damages. Thus, the appellant contended that the trial court failed to take into account into consideration on the vagaries of life by applying a multiplication of fifteen(15) fears and multipliant of kshs.35,000/- without proof.

The appellants, also contended that there was no concrete documentary evidence to establish the amount of kshs.128,000/- for special damages.

[13] In essence, the appellants contended that the awards made in respect of loss of dependency and special damages and indeed, under all heads of damages were inordinately high or excessive to be a wholly erroneous estimate of the damage.

Loss of dependency is a claim awardable under the **Fatal Accidents Act** to the dependents of the deceased. In this case, the respondent and his two adult children as duly established in evidence.

[14] In assessing damages under the Fatal Accidents Act, courts are normally guided by the age of the deceased, the monthly income(if any) and the expected length of dependency (**see, Beatrice W. Thairu Vs Ezekiel Bargatuny & Another Nairobi HCCC No.1438/98**)

Under **Section 4(1)** of the **Fatal Accidents Act**-

*“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child of the person whose death was so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and every such action the court may award such damages as it may think fit proportioned to the injury resulting from the death to the persons respectively for whom or for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the dependant, shall be divided amongst those persons in such shares as the court, by its judgment shall find and direct.....”.*

[15] Herein, there was no evidence from the appellant's to dispute the fact that the respondent and his children were dependents of the

deceased's contribution towards the welfare of the family and education of her children. There was sufficient evidence to show that the deceased was a business lady and earned approximately ksh.50,000/- per notice from her business as a motor vehicle spares dealer. She had a reasonable number of years before she could retire from the business(if at all), but for her untimely demise due to the appellant's negligence.

[16] Earnings of a deceased person from the death is what is used as a basis to determine the multiplication in assessing loss of dependency, while the age of the deceased at the time of death is what is used as a basis to determine the multiplier.

The extent of dependency is always a question of fact to be established in each case, but in any event, the dependency ratio must be reasonable in the circumstances.

[17] Proof of earnings is necessary but not by way of a specific mode or manual. A person may earn income from a service or business venture, yet fail to provide documentary evidence in proving the fact and the amount earned.

Indeed, in the case of **Jacob A. Maruya & Another Vs Simeo Obayo (2015)eKLR**, the Court of Appeal stated that:-

*“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificate and that the only way of proving earnings is equally the production of documents. That kind of stand could do a lot of injustice to very many Kenyans who are even illiterate, keep no record and yet earn their livelihood in various ways. If a documentary evidence is availed that is well and good. But we reject any contention that only documentary evidence can prove in these things.*

[18] In this case, proof of the deceased's monthly earnings at the time of her death was by way of income tax returns which placed such earnings at between ksh.33,000/- to kshs.55,000/- . The trial court assessed this at kshs.35,000/- per month on the basis of the documentary evidence availed. This court agrees with that assessment and hence, the application of kshs.35,000/- as the multiplication. The court also agrees with the multiplier of fifteen(15) year as it clearly took into account the vagaries of life otherwise it would have been higher considering that the deceased was aged 46 years at the time of her demise and as a business lady was not expected to venture on attaining a specific age. A sole business person operates his/her trade as a livelihood for which he/she takes until departure from this world or becomes disabled by illness or accident.

This court further agrees that the dependency ratio of 2/3<sup>rd</sup> was reasonable in the circumstances.

[19] The award of kshs.20,000/- for pain and suffering and that of kshs.100,000/- for loss of expectancy of life was not disputed and/or substantially disputed in this appeal. The awards are therefore affirmed and left standing.

With regard to the amount of kshs.128,000/- for special damages, the figure exceeded what was actually claimed by the respondent in the plaint. This was the sum of **kshs.93,330/-** for medical expenses and funeral expenses.

The trial court ought therefore not have awarded a sum over and above the claimed amount as special damages.

[20] It was therefore erroneous for the trial court to award a sum of kshs.128,000 as special damages which must not only be pleaded but also specifically established and proved. What was established and specifically proved was the expense incurred for the burial of the deceased. This was the sum of **kshs.64,000/-** as depicted by necessary documentary evidence (PEx7 a-b). The first document(PEx7[a]) was a payment receipt while the extra document(PEx[b]) was the invoice for that amount.

[21] It would appear that the trial court erroneously used both the receipts and invoice to arrive at the figure of ksh.128,000/- for special damages. Therefore, this award is hereby set aside and substituted for award of special damages in the sum of kshs.64,000/-.

The general damages with respect to pain and suffering as well as loss of expectancy of life were not substantially disputed and were reasonable in the circumstances.

The damages for the loss of expectancy of life was grounded on the Law Reform Act and as a matter of course, was taken into account by the trial court when it awarded damages under the Fatal Accidents Act. It cannot therefore be deducted from the amount awarded for loss of dependency as argued by the appellants.

[22] In the **Kemfro Africa Ltd case(Supra)**, it was stated that:-

*“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 and so it appears the legislature intended that it should be considered”.*

The court went further to state that:-

*“Section 2(5) of the Law Reform Act says that:- (5) The right conferred by this part are for the benefit of the estate of the deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased person by the Fatal Accidents Act ..... 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”.*

[23] In sum, the appeal, save for the alteration made hereinabove respecting the award of special damages by the trial court, is largely devoid

of merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

*(Delivered and signed this 30<sup>th</sup> day of November, 2020)*

**J.R. KARANJAH**

**JUDGE OF THE HIGH COURT**