



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO.1 OF 2018**

**PETER WAMAHIU WAITHAKA.....APPELLANT**

**VERSUS**

**WELLS FARGO COURIER SERVICES LTD.....1<sup>ST</sup> RESPONDENT**

**DAVID NYAGA.....2<sup>ND</sup> RESPONDENT**

***(Appeal against the Judgment of Hon. R.Kefa-Senior Resident Magistrate***

***in Nyeri CMCC No.22 of 2016 of 11<sup>th</sup> December 2017.)***

**JUDGMENT**

Through a plaint filed on 21<sup>st</sup> January 2016 the plaintiff sought judgment against the defendant for: -

- a) Special damages of Kshs. 28,200/-
- b) General Damages under the Law Reform Act and the Fatal Accidents Act.
- c) Costs of the suit.
- d) Interest at court rates.

The claim arose out of an accident that happened on 9<sup>th</sup> April 2015 when the deceased Peris Waigumo Wamahi daughter of the plaintiff was travelling in motor vehicle Reg. No. KBA 480A which was driven by the 2<sup>nd</sup> defendant David Nyaga.

The plaintiff's claim was that the defendant so negligently drove the said motor vehicle that it was involved in the Road Traffic Accident out of which Peris sustained injuries that led to her death.

It was also pleaded that the deceased was 26 years at the time of death, that she was employed as a security guard earning Kshs. 15,000/- per month, that she was the bread winner of her family, minor son aged 5 years old, her mother and father.

In a statement of defence filed on 20<sup>th</sup> July 2016 the defendant denied all the particulars of negligence. They admitted that the deceased earned Kshs.15,000/- but denied she was the bread winner for her parents.

During the trial, the plaintiff testified, relied on his witness statement and called one witness, a police officer.

His testimony was that the deceased was his first born daughter, was employed by the 1<sup>st</sup> defendant, died in the course of employment, was the bread winner for her child aged 6 ½ years then, and for him and his wife- that she would send them Kshs.4000/- per month. Now they were left with her child whom they had to take care of without her assistance.

The police officer No.82348 PC Maina testified that this was a case of a self-involving fatal Road Traffic Accident. That the 2<sup>nd</sup> defendant was driving the motor vehicle along the Meru/Nanyuki Road and the deceased was a passenger. That the driver lost control of the motor vehicle at Marindat due to high speed and the motor vehicle went off the road. He said they found skid marks 15m long an indication of

being driven at high speed. Both the driver and deceased sustained injuries but the deceased died on arrival at Nanyuki District Hospital. The 2<sup>nd</sup> defendant was blamed for the accident by the police and was charged with causing death by dangerous driving at Meru Law Courts- IAR 49/2015.

The defence did not offer any evidence leaving the testimony of the plaintiff and his witness uncontroverted.

Upon considering the evidence on record and the submissions by Karweru & Co. Advocates for the plaintiff and J. K. Kibicho for the defendant the trial magistrate found for the plaintiff as against the defendant in the following terms: -

- i) Liability – 100%
- ii) Pain and suffering –Kshs. 20,000/-
- iii) Dependency ratio – 2/3
- iv) Deceased income- Kshs. 5,436/- on the ground that Kshs. 15,000/- claimed was not proved.
- v) Multiplier of 26 years
- vi) Special damages of Kshs. 28,200/-

Total: - Kshs.1, 178,888/- plus costs and interest at court rates.

The plaintiff was dissatisfied with the decisions and filed this appeal on the following grounds.

- a) *That the trial magistrate erred by failing to find that the earning of the deceased was admitted at Kshs. 15,000/- per month.*
- b) *That the multiplicand of 26 years was an error where deceased was 27 years at the time of death.*
- c) *That the award for loss of dependency was too low, and the failure to award for loss of expectation of life was an error.*

In his submissions counsel for the appellant pointed out that the deceased's income was admitted hence the award of Kshs. 5,436/- was an error. The appellant did not have to present any evidence to prove what was admitted by the respondent. That the omission of an award for loss of expectation of life was an error and ought to be awarded at Kshs. 200,000/- That the multiplicand ought to be 34 years as the deceased could have worked up to the age of 60 years.

The respondent through J.K. Kibicho & Co. Advocates on issue of the earnings submitted that it was the appellant who asserted the wage of Kshs. 15,000/- and under Section 107 and 108 of the Evidence Act, he was obliged to prove the same. That in giving the multiplicand of 26 years the court considered the authorities and gave its reasons. The respondent relied on *Kemfro Africa Ltd t/a Meru Express Services vs Lubia & Another (1987) eKLR*

The issues for determination are: -

- i) Is the deceased's income admitted? Did the appellant need to prove that?
- ii) Is the multiplicand 26 years reasonable in the circumstances?

This being a first appeal the court is obligated to reassess and reevaluate the evidence and arrive at its own conclusions always bearing in mind that I had not the advantage of seeing and hearing the witnesses. That the appeal court ought not to interfere with findings of fact, or exercise of discretion unless done so on the wrong principles.

I have carefully considered the submissions by each party, and the evidence on record.

On the earnings of the deceased, the defendant admitted in their pleading, that the deceased's salary was Kshs.15,000/- per month. Section 107 and 108 of the Evidence Act do not apply in the circumstances. In fact, on that admission the plaintiff would have sought judgment on the issue. That is the purport of Order 13 rule 2-

***“Any party may at any stage of a suit, where admission of fact has been made on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions as he may be entitled to, without waiting for the determination of any other question between the parties, and the court may upon such application make such order or give such judgment as the court may think just”***

Clearly therefore the plaintiff did not need to prove /lead evidence to prove a fact that was already admitted by the defendants. The trial magistrate erred in finding that the appellant had not proved the same.

I therefore make the finding or admission that the deceased was earning Kshs. 15,000/- per month.

On the issue of the multiplicand, the usual retirement period is now 60 years, however taking into considerations there are vicissitudes of life the deceased could have worked up to 55 years. According to the certificate of death Entry No.0241501449 issued on 14<sup>th</sup> May 2015 deceased was 27 years at the time of death. I think a multiplicand of 28 years would be reasonable. There are numerous authorities that court's award an amount for loss of expectation of life- the trial court was in error for not making that award. The usual award is Kshs.100,000/-

The argument that the deceased's parent did not establish dependency is untenable. The deceased was the first born child of her parents. We are Kenyans. It comes with the territory of being a child of your parents, a sibling, even a village mate. It is abnormal for one, especially first born daughter who is employed and single not to support her parents and her siblings. It is what is expected of her and in this case she had a child who was staying with her parents.

I find no reason to disturb the magistrate's finding on the dependency ratio of 2/3. Hence the appeal succeeds. The trial court's judgment is set aside and substituted with the following: -

Liability - 100%

Pain and suffering – Kshs.10, 000/-

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

Loss of dependency -15000 X 28 X 12 X 2/3 = Kshs. 3,360,000/-

Special Damages - Kshs. 28,200/-

Total **Kshs. 3,498,200/-**

plus, costs and interest at court rates from date of judgment in the subordinate court.

**Dated, delivered and signed at Nyeri this 22<sup>nd</sup> day of February 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Court Assistant: Juliet

Karweru for Appellant

J.K.Kibicho for Respondent.

Kinuthia holding brief for Nyangati for Respondent

**Mumbua T. Matheka**

**Judge**

**22/2/19**