



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CIVIL APPEAL NO. 34 OF 2015**

**OMARI SHARIF.....1<sup>ST</sup> APPELLANT**

**SALIM KONDE WASHE.....2<sup>ND</sup> APPELLANT**

**CROWN PETROLEUM KENYA LTD .....3<sup>RD</sup> APPELLANT**

**-Vs-**

**HENRY MUSULUMA ILIATI & VIOLET KHASIALA (Suing as the Administrator  
of the Estate of Phillip Lushirika Musuluma) (Deceased).....RESPONDENTS**

**JUDGMENT**

**Background**

1. The appellant filed this appeal on 18<sup>th</sup> March 2015. In September 2017 an application for dismissal of the appeal for want of prosecution was filed. Meoli J in a Ruling of 1<sup>st</sup> August 2018 found the appellant had delayed in prosecuting the appeal, but declined to dismiss the same, opting instead to fast track the hearing of the appeal.

2. The parties went to sleep again and on 4<sup>th</sup> June, 2019 a notice to show cause why the appeal should not be dismissed was issued. This prompted the appellants to file the Record of Appeal and leave was granted to parties to file written submission ready for judgment on 24<sup>th</sup> October, 2019.

3. Only the appellants' submissions are on file. They challenge the quantum of damages awarded by the lower court which are as follows:-

Pain and suffering	Ksh	30,000.00
Loss of expectation of life	Kshs	100,000.00
Loss of dependency	Kshs	500,000.00
Special Damages	Kshs	<u>27,275.00</u>
Sub-total	Kshs	657,275.00
Less Contribution 30%	<u>Kshs</u>	<u>197,182.50</u>
<b>Total</b>	<b><u>Kshs</u></b>	<b><u>460,092.50</u></b>

4. In brief, the facts are that the deceased was lawfully travelling in motor vehicle KAJ 585G along Nakuru-Nairobi road when it was involved in an accident on 16<sup>th</sup> August 2007 with motor vehicle registration KAD 465U/ZC 6067. The latter vehicle was registered in the

name of the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant, now the appellants. A consent on liability at 70:30% in favour of the plaintiff was recorded.

5. The Plaintiffs/Respondents are the administrators of the deceased's estate. Henry Musuluma is the father of the nine year old deceased who died on 17<sup>th</sup> August, 2009 following the accident.

6. The grounds of appeal are as follows:

**“1. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's Submissions.**

**2. That the Learned Trial Magistrate erred in law and in fact in awarding excessive and unrealistic damages under the head of loss of expectation of life.**

**3. That the Learned Trial Magistrate erred in law and in fact in awarding excessive and unrealistic damages under the head of loss of dependency.**

**4. That the Learned Trial Magistrate erred in law and in fact in awarding the loss of expectation of life in addition to loss of dependency and yet the same is not awardable in addition.”**

7. I shall deal with the appeal under each head in this matter. I note the established principle that the trial court's award of damages cannot be interfered with unless it was so inordinately high or low that an application of wrong principles must be inferred, or where it is shown that the wrong principles were indeed applied.

#### **Loss of Expectation of Life**

8. The appellants submit that the award of Shs 100,000/= was excessive. They had proposed an award of Kshs 70,000/= in the trial court. They relied on the case of **Ali Elmi Saney & Another v Mohamed Bakari & Another Nairobi HCCC No. 2225 of 1997**. In that case an award of Shs 70,000/= was made under this head by Ang'awa J.

9. On their part, the plaintiffs had sought damages of Shs 150,000/= under this head, and cited **Salim Golamali T/A Kalenjin Anto Hardware v Lucas Okoa Nyongesa Busia HCCC No. 52 of 2001**, where Shs 120,000/= was awarded.

10. I note that whilst the case of **Ali Elmi Saney** is a 1997 decision, that of **Salim Golamali** is for 2001, closer to the time when the present case was filed. The award of the trial court cannot be said to be excessive in the circumstances as it was within the range of awards under this head.

#### **Loss of dependency**

11. The trial court awarded Shs 500,000/= under this head. The appellants consider this an excessive award for a minor of only nine years old, but do not dispute a global award. They consider the award to be out of tandem with decided case law; noting that the age of the child must be considered (See **Kenya Breweries Ltd v Saro [1981] eKLR 408** where the Court of Appeal awarded a 6 year old minor Shs 100,000/= as conventional sum.

12. The appellants also cited the case of **Charles Ouma Otieno & Another v Bernard Odhiambo Ogecha (suing as the Brothers and Legal Representative and Administrator of the Estate of Oscar Onyango Ogecha [2014] eKLR** where Sitati J awarded a lump sum of Shs 350,000/= for a deceased person who was aged 14 years. The basis of the award was that there was no knowing what the deceased would have become had he lived his life to the full.

13. In their submissions in the lower court; the appellant pointed out that there was no evidence that the deceased was attending school; that there was insufficient evidence to prove income; that there was nothing to show that the deceased intended to become a doctor as alleged; and that there was no evidence of dependency. In the alternative, they urged that if the court was minded to make any award under this head, then a multiplicand of Shs 4,000/= in wages and a multiplier of 2 years with a dependency ration of 1/3 should be applied resulting in an award of  $4,000 \times 2 \times 12 \times 1/3 = 32,000/=$ . On appeal, they urge that the award of Kshs 500,000/= be substituted with one for between 100,000 to 250,000/=.

14. The trial magistrate in making the award under this head relied on the **Salim Golamali** case (supra) where a global figure of 100,000/= was awarded for a minor aged 12 years in 2005 and then factored in inflation to find the increased sum of Kshs 500,000/= as reasonable.

15. I think there is a basic error underlying the factoring of inflation here, in that the trial court clearly overestimated the rate of inflation. By awarding 500,000/= in 2015 from 100,000/= in 2005, he determined a 500% inflation rate over the ten year period (2005 - 2015). This appears to me to be unrealistic and unreasonable approach.

16. I am prepared to accept the appellant's alternative argument in the lower court to use a multiplicand of Shs 4,000/= wages but with a multiplier, however, of 20 years and a dependency ration of 1/3. The calculation would thus be:

$$4,000 \times 12 \times 1/3 = 320,000/=$$

I therefore award Shs 320,000/= under this head in place of Shs 500,000/=.

### **Duplication of awards under Law Reform Act and Fatal Accidents Act**

17. The appellants finally argued that under the principle enunciated in **Kemfro Africa Ltd T/A Express Service v AM Lubia and Olive Lubia [1987] KLR 30** where an award is given under both the Fatal Accidents Act and the Law Reform Act there ought to be no duplication of awards to the dependants and the estate.

18. In the **Kemfro Case** the Court of Appeal held that there a claimant gets award under the Law Reform Act and the Fatal Accidents Act, the former should be deducted from the latter. The court held:

**“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.”**

The trial court did not consider this aspect, which I will take into account.

19. Given all the foregoing, I conclude that the award of the trial court be and is hereby set aside. The award will now be as follows:-

Pain and suffering	Ksh	30,000.00
Loss of expectation of life	Kshs	100,000.00
Loss of dependency	Kshs	320,000.00
Special Damages	Kshs	<u>27,275.00</u>
Sub-total	Kshs	457,275.00
Less Contribution 30%	<u>Kshs</u>	<u>113,182.50</u>
<b>Total</b>	<b><u>Kshs</u></b>	<b><u>264,092.50</u></b>

The lower court's judgment is therefore substituted with the judgment herein.

20. The appeal having been partially successful, each party shall bear its own costs of the appeal.

21. Orders accordingly.

**Dated and Delivered at Naivasha this 24<sup>th</sup> Day of October, 2019.**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ombui for the Appellants

2. No Representation for the Respondents

3. Court Clerk - Quinter Ogutu