

Kshs 2,519,527/=

Plus costs and interest.

2. Being dissatisfied with the said decision, on 28th May 2015, the Appellants filed an undated Memorandum of Appeal. They relied on eight (4) grounds of appeal.

3. Their Written Submissions were dated 7th May 2019 and filed on 26th June 2019 while those of the Respondents were dated 6th May 2019 and filed on 22nd May 2019.

4. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. The apportionment of liability was not in contention as the parties had already recorded a consent on liability at 90%-10% in favour of the Respondent herein. The only issue that had been placed before this court therefore was whether or not the Learned Trial Magistrate awarded damages that were inordinately high or manifestly excessive warranting its interference.

8. The said issue was addressed under the distinct heads shown hereinbelow.

I. DAMAGES UNDER THE FATAL ACCIDENTS ACT

9. The Appellants submitted that the award of Loss of Dependency was inordinately excessive. In assessing the damages under this head, the court had to consider the multiplicand, the multiplier and dependency ratio. The same have been dealt with as shown hereunder.

A. DEPENDENCY RATIO

10. The Appellants did not appear to object to the adoption of 1/3 as the dependency ratio. The court did not therefore disturb the same.

B. MULTIPLIER

11. Grounds of Appeal No (4) was dealt with under this head.

12. The Appellants submitted that the multiplier of thirty one (31) years being the balance of the working years the deceased had been left with that was adopted by the Learned Trial Magistrate was not merited. They proposed fifteen (15) years as the multiplier.

13. In support of their argument, they relied on the case of **F M M & Another vs Joseph Njuguna Kuria & Another [2016]eKLR** where the court therein adopted a multiplier of twenty three (23) years where the deceased was twenty six (26) years of age. They also referred to other cases which they had not attached to their Written Submissions.

14. On their part, the Respondents contended that the Trial Court took the deceased's age of twenty nine (29) years to get the balance of her working years of thirty one (31) years. They submitted that the court can take judicial notice of the fact that a saloonist or hairdresser could work beyond sixty (60) years.

15. They placed reliance on the case of **Board of Governors Kangubiri Girls High School & Another vs Jane Wanjiku & Another [2014] eKLR** where the court therein held that the choice of a multiplier was a matter of the court's discretion which had to be exercised judiciously and with a reason.

16. They relied on the case of **Kenya Horticultural Exporters Limited vs Julius Munguti Maweu [2010] eKLR** where the court therein adopted a multiplier of eighteen (18) years where the deceased was sixty three (63) years at the time of his death.

17. There was no dispute that the deceased was aged twenty nine (29) years at the time of her death as was evidenced in the Certificate of Birth that showed that she was born on 9th January 1983. What was in contention was whether or not the multiplier that was adopted was reasonable.

18. This court agreed with the Appellants that it was erroneous for the Learned Trial Magistrate to have purported to have adopted a multiplier of thirty one (31) years as the multiplier on the basis of the same having been the balance of the deceased's working years. This was because even where a person is expected to retire at sixty (60) years, the vicissitudes and/or vagaries of life do not guarantee him the entire balance of working years.

19. It was for that reason that this court found that a multiplier of twenty four (24) years to have been a reasonable multiplier.

20. In arriving at the said figure, this court had due regard to the case of **Patrick Murerwa Mbui vs Attorney General [2006] eKLR** where the court adopted a multiplier of twenty two (22) years in a case where the deceased was aged thirty three (33) years. In the case of **Serah Wothaya Macharia & Another vs Francis Terere & Another [2017] eKLR**, bearing in mind the imponderables in life, this very court adopted a multiplier of twenty two (22) years where the deceased was aged thirty three (33) years at the time of his death to have been reasonable.

21. There was therefore merit in the Appellants' Ground of Appeal No (4) that the multiplier adopted by the Learned Trial Magistrate was based on the wrong principles. The multiplier was too excessive in the circumstances, the said Ground of Appeal was merited and the same is hereby allowed.

C. MULTIPLICAND

22. Grounds of Appeal Nos (1), (2), (3), (5), (6) and (7) were dealt with under this head because they were all related.

23. The Appellants averred that the evidence that was adduced by Prisca Mmbone Musungu and Willian Chole (hereinafter referred to as "PW 1" and "PW 2" respectively) was not credible and was fraudulent. They contended that the payslip bore the wrong spelling of the deceased's name, which was evidence that it was fraudulent and that PW 2 was not able to explain how the deceased could have earned Kshs 20,000/= in three (3) weeks prior to her death which occurred on 21st April 2012 yet the payslip was dated 31st March 2012 to 4th April 2012.

24. They added that the payslip was also not on a letter head to ascertain that the deceased worked at Queens Beauty Centre and Barber Shop. It was their contention that the evidence that was adduced by the Respondents and in particular by PW 2 was questionable and was of low probative value. They pointed out that the Learned Trial Magistrate ignored their evidence and considered irrelevant issues to arrive at the decision that he did.

25. On their part, the Respondents submitted that there was nothing on the court record that showed that PW 2 was not a credible witness. They pointed out that the Learned Trial Magistrate merely observed that he found the pay slip to have been more credible evidence. It was their submission that there was distinction between the credibility of a witness and probative value of a document that has been produced by a witness.

26. Their evidence was that the deceased earned a monthly salary of Kshs 19,700/= as a hairdresser as was evidenced in the pay slip of March 2012 as opposed to the one that was produced by the Appellants for December 2011. They were emphatic that the most recent pay slip was the most reliable in terms of assisting a court to determine which multiplicand to adopt.

27. In support of their arguments under this head, the Appellants relied on the case of **Chunibhai J Patel & Another vs PF Hayes & Others (1957) EA 748, 749** where the Court of Appeal held that the court should find the age of the deceased and the expectation of his working life and consider the ages and expectation of his dependants, his net earnings power after deductions so as to arrive at the annual value of dependency.

28. This court did not find the said case to have been relevant to support their submissions that the Learned Trial Magistrate erred in having adopted a sum of Kshs 19,700/= per month. Rather, it agreed with the Respondents that the said Learned Trial Magistrate arrived at a reasonable conclusion because as he observed, the latest pay slip represented a reasonable position regarding the deceased's salary as it was for the previous month before she passed away. It was not necessary that the same be on a letter head. It was sufficient that the same was issued by the deceased's employer and that the same was not rebutted and/or controverted by any other credible evidence by the Appellants.

29. This court therefore took the view that the Appellants' arguments under this head. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3), (5), (6) and (7) were not merited and the same are hereby dismissed.

I. DAMAGES UNDER THE LAW REFORM ACT

A. LOSS OF EXPECTATION OF LIFE

30. The Respondents were aggrieved by the Learned Trial Magistrate's failure to award them damages under this head. They urged this court to award them a sum of Kshs 150,000/= under this head. The Appellants never submitted on this issue because they filed their Written Submissions before the Respondents filed theirs.

31. Although the Respondents did not cross-appeal, this court noted that the Learned Trial Magistrate erred when he failed to award them any monies for loss of expectation of life. Damages for loss of expectation of life under the Law Reform Act are quite distinct from those under the Fatal Accidents Act. A court must not look the other way if it is evident from the lower court proceedings that a trial court applied the wrong principles to arrive at an erroneous conclusion.

32. Whereas the court had due regard to the case of **Selle vs Associated Motor Boat Company Ltd** (Supra) where it was held that it is not

enough that the appellate court might have come to a different conclusion, it also took into account the holding in the case of **Butt vs Khan (1977) 1 KAR** where it was held as follows:-

“An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles (emphasis court), or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

33. It was therefore the considered view of this court that a sum of Kshs 120,000/= was reasonable under this head. In arriving at the said conclusion, this court had due regard to the case of **Kenya Power Limited vs James Matata & 2 Others [2016] eKLR** where this very court upheld an award of Kshs 100,000/= for loss of expectation of life.

B. PAIN AND SUFFERING

34. Ground of Appeal No (8) was dealt with under this head.

35. The Appellants submitted that the award of Kshs 50,000/= for pain and suffering was excessive in the circumstances because the deceased died on the spot. They relied on the case of **Samuel Kimutai Korir (suing as the personal and legal representative of Estate of Chelangat Sylvia vs Nyanchwa Adventist Secondary School & Another [2016] eKLR** where the court awarded a sum of Kshs 10,000/=.

36. On their part, the Respondents asked this court not to tamper with the said award of Kshs 50,000/= for pain and suffering from the reason that courts have been awarding a sum of Kshs 100,000/= under this head. They did not attach the case relied upon to support their argument in that regard.

37. Bearing in mind the inflationary trends, this court came to the conclusion that the sum of Kshs 50,000/= for pain and suffering was not manifestly excessive. In arriving at the said figure, this court had due regard to the cases of **Beatrice Nyanchama Obuya vs Hussein Dairy Limited [2010] eKLR** where the court therein awarded a sum of Kshs 20,000/= where the cause of death was cardio-respiratory arrest, **Charles Masoso Barasa & Another vs Chepkoech Rotich & Another [2014] eKLR** where the court awarded a sum of Kshs 15,000/= for pain and suffering where the deceased therein died a few hours after being involved in a road traffic accident and the case of **Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** where the court awarded a sum of Kshs 75,000/= in respect of a deceased who died on the spot.

38. In the premises foregoing, this court found Ground of Appeal No (8) not to have been merited and the same is hereby dismissed.

DISPOSITION

39. In the circumstances foregoing, the upshot of this court's decision was that the Appellants' Appeal was partially successful. The effect of this decision was that judgment of the Learned Trial Magistrate in the sum of Kshs 2,519,527/= that was delivered on 30th April 2015 be and is hereby set aside and/or vacated.

40. In its place, it is hereby ordered that judgment be and is hereby entered in favour of the Respondents against the Appellants jointly and severally for Kshs 2,131,087.50 made up as follows:-

a. Loss of dependency	Kshs 1,891,200.00
1/3 x 19,700 x 24 x 12	
b. Loss of expectation of life	Kshs 120,000.00
c. Pain & Suffering	Kshs 50,000.00
d. Special Damages	<u>Kshs 306,675.00</u>
	Kshs 2,367,875.00
Less 10%	<u>Kshs 236,787.50</u>
	<u>Kshs 2,131,087.50</u>

Plus costs and interest at court rates until payment in full. For the avoidance of doubt, interest on the special damages will accrue from the date of filing suit while interest on damages relating to loss of dependency, loss of expectation of life and pain and suffering will be from the date of judgment on 30th April 2015.

41. In view of the fact that the Appellants were partially successful in their Appeal herein, each party will bear its own costs of this Appeal.

42. It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of December 2019

J. KAMAU

JUDGE