



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 24 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

ONDIGO GILBERT.....APPELLANT

AND

JOAB JONAH OLUNYAMA &

ALICE TERRY OLESI OLUNYAMA suing as personal representative of

of SYLVESTER ERICK ORUNYAMA (DECEASED)....RESPONDENTS

(Being an appeal from the Judgment and Decree of Hon. K. Sang, SRM dated 15th February 2017 at the Principal Magistrates Court at Maseno in Civil Case No. 19 of 2015)

JUDGMENT

1. The case before the subordinate court was that the deceased, Sylvester Erick Orunyama, was a pedestrian along the Maseno–Luanda road on 24th August 2014, when the appellant’s driver drove motor vehicle registration number KBA 326V negligently causing the vehicle to knock down the deceased and as a result he sustained fatal injuries. The deceased personal representative claimed damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. Ultimately the issue of liability was agreed by consent at the ratio of 70:30 against the appellant and the matter proceeded for assessment of damages. The court made the following award that has now precipitated this appeal;

Pain and Suffering	Kshs. 20,000/-
Loss of expectation of life	Kshs. 120,000/-
Loss of dependency	Kshs. 2,417,040/-
Special damages	Kshs. 96,670/-
Less 30% contribution	
Total	Kshs. 1,759,597/-

2. The grounds of appeal are set out in the petition of appeal. In summary the appellant’s counsel contested the grounds upon which the court assessed the multiplier, multiplicand and dependency ratio for the award for loss of dependency under the **Fatal Accidents Act** and the award for special damages. Before I consider the said grounds and contesting arguments, I must keep in mind the general principal upon which this Court, as an appellate court, will interfere with an award of damages. It was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

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

3. According to the plaint, the deceased was aged 26 years and was at the time working as a driver by profession driving a matatu along

Kisumu-Bungoma Road earning a monthly salary of Kshs. 15,000/- which he maintained his dependant who included his father, aged 62 years, mother aged 58 years and 6-year-old son. The deceased's father, Joab Olunyama (PW 1) testified on behalf of the respondent. PW 1's testimony basically mirrored what was set out in the plaint.

4. After setting out the facts and evidence, the trial magistrate in the judgment stated as follow:

The arena of calculating damages in fatal accidents is replete with speculation and probabilities which The real issue of making reasonable compensation in regard to the peculiar circumstances of each case. It is my considered opinion that an award of Kshs. 1,759,597/- will suffice as reasonable compensation for the loss suffered by the plaintiff as a result of the deceased's death.

5. Although the trial magistrate was correct to note that the assessment of damages, as it is, ventures into the realm of speculation. The assessment is based on facts established through the evidence adduced at the trial and it is the duty of the trial magistrate to analyse the evidence in light of the applicable principles to come up with an appropriate award. The trial magistrate failed to give a basis for each award hence this court cannot determine whether the award was based on the facts and sound principles. I am therefore entitled to intervene in the judgment and re-assess the award as the first appellant court.

6. I now turn to the substantive challenge to the award. The multiplicand represents the income the deceased was earning. In his evidence, PW 1 stated that the deceased was a driver. He gave the income of the deceased as Kshs. 15,000/-. The appellant contended that there was no documentary evidence to prove that the deceased was a driver. Counsel for the respondent countered that apart from the oral testimony, the fact was corroborated by the death certificate which showed that the deceased was a driver.

7. The trial magistrate awarded Kshs. 10,071/- which, from the appellant's submissions before the trial court, was the minimum wage for a driver under the applicable **Regulation of Wages (General)(Amendment)Order, 2013 LN No. 197/2013**. I accept the decision of the Court of Appeal in **Jacob Ayiga Maruja & Another v Simeone Obayo KSM CA Civil Appeal No. 167 of 2002 [2005]eKLR** where it was observed that, "We do not subscribe to the view that the only way of proving earnings is equally the production of documents." The claimants need only prove the case on a balance of probabilities hence I hold that PW 1's testimony on oath is corroborated by what is stated in the death certificate that the deceased was a driver. I therefore find that the deceased was a driver. I would award the minimum wage of Kshs. 10,071/- as the multiplicand.

8. Determination of the applicable dependency ratio is a question of fact (see **Boru v Onduu [1982 -1992]2 KAR 288**). I have taken into account the fact that PW 1 told the court that he was a livestock dealer hence he was supporting himself and his wife. I would assume that a substantial part of his income went to support his young child. In this case, I would consider a dependency ratio of ½ appropriate in the circumstances.

9. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In arriving at the multiplier, the court should consider the circumstances and conditions of life of the deceased could have lived, keeping in mind that the standard of life, the life expectancy in Kenya has reduced over the years and the period of expected dependency. In this case the deceased was a driver and would have an active working life of about 30 years and considering the age of the child and the expected period of dependency I would hold that 24 years is an appropriate multiplier.

10. Funeral expenses are in the nature of special damages and the law is that they must be pleaded and proved to the required standard (see **Hahn v Singh [1985] KLR 716**). The respondent prayed for a total amount of Kshs. 254,670/- as funeral expenses made up as follows; Kshs. 16,250 for obtaining letters of administration, Kshs. 3,220/- for medical expenses, Kshs. 4,300/- a mortuary fees, post mortem fee of Kshs. 8,000/-, Kshs. 15,000/- for the coffin and Kshs. 208,000/- as funeral expenses. The trial magistrate awarded Kshs. 46,670/- and Kshs. 50,000/- reasonable expenses making a total of Kshs. 96,670/-. PW 1 produced receipts to support the award of Kshs. 46,670/- and this sum was properly granted. Although the appellant claimed the additional sum as funeral expenses for the trial magistrate considered that Kshs. 50,000/- was reasonable. The trial magistrate did not state why he disregarded the evidence showing that he paid money to caterers at the funeral but on this ground, there was no cross-appeal. The trial magistrate was no doubt guided by what the court stated in **Jacob Ayiga Maruja and Another v Simeon Obayo (Supra)** that, "We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses." I find that the claim for special damages was therefore proved and properly awarded.

11. Flowing from what I have stated, I allow the appeal and set aside the awarded for loss of dependency under the **Fatal Accidents Act** and substitute it with an award of **Kshs. 1,450,224.00 being (Kshs. 10,071 X 12 X 24 X ½)**. Accordingly, the total award shall be as follows:

Pain and Suffering	Kshs.	20,000/-
Loss of expectation of life	Kshs.	120,000/-
Loss of dependency	Kshs.	1,450,224/-
Special damages	Kshs.	96,670/-

Kshs. 1,686,894/-

Less 30%

TOTAL Kshs. 1,180,825.80

12. The amount shall accrue interest from the date of judgment in the subordinate court. The appellant shall have the costs of the appeal which I assess at **Kshs. 45,000/-**.

DATED and DELIVERED at KISUMU this 20th day of April 2018.

D.S. MAJANJA

JUDGE

Ms Barasa instructed by Peter M. Karanja, Advocate for the appellant.

Mr Okoth instructed by Geoffrey O. Okoth and Company Advocates for the respondents.