



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**CIVIL APPEAL NO. 6 OF 2016**

**PAUL OUMA..... APPELLANT**

**VERSUS**

**ROSEMARY ATIENO ONYANGO &**

**PETER JUMA AMOLO**

**(Suing as the legal representative in the estate of**

**JOSEPH ONYANGO AMOLLO (Deceased) .....RESPONDENT**

**JUDGMENT**

1. The Appellant **PAUL OUMA** was the defendant at the lower Court. The Respondent through a plaint dated 11<sup>th</sup> August 2015 sued the appellant as legal representative and personal representative of the estate of **JOSEPH ONYONGA AMOLLO** deceased following his death comes out of a road traffic accident seeking the following:-

*(a) General damages*

*(b) Special damages KShs.22,100/=.*

*(c) Costs of the suit.*

*(d) Interest on (a), (b) and (c) at Court rates.*

2. The Appellant filed statement of defence dated 11.8.2016 praying that the Respondent's suit be dismissed with costs.

3. The Respondents in return filed a reply to defence praying that the Appellant's defence be struck out or dismissed and judgment be entered for the Respondents as prayed in the plaint.

4. During the hearing of the case the Respondent gave evidence, called no witness whereas the Appellant gave no evidence. The trial Court in its judgment entered judgment in favour of the Respondent as follows:-

*(a) Pain and suffering* - *KShs. 20,000/=*

*(b) Loss of expectation of life* - *KShs.100,000/=*

<b>(c) General Damages for loss of Dependency -</b>	<b>KShs.800,000/=</b>
<b>(d) Special Damages</b>	<b>- <u>KShs. 22,100/=</u></b>
<b>Net Total .....</b>	<b>- <u>KShs. 942,100/=</u></b>
<b>(e) Costs to the Respondent with interest. -</b>	

5. The Appellant aggrieved by the lower Court's judgment delivered on 13.7.2015 preferred this appeal through a memorandum of appeal dated 1<sup>st</sup> August 2016 and filed on 5<sup>th</sup> August 2016, setting out the following grounds of Appeal, thus:-

**1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on Quantum before him superficially and consequently coming to a wrong conclusion on the same.**

**2. The Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellants.**

**3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.**

**4. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.**

**5. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.**

6. The Parties Advocates put in their respective submission which they relied upon and opted not to highlight on the same.

7. The Appellant in his submission dated 1.12.2017 urges the trial Court was in error in awarding he Respondent damages for pain and suffering of KShs.20,000/=, KShs.100,000/= for loss of expectation of life under the Law Reform Act, KShs.800,000/= for loss of dependence under Fatal Accidents Act using a multiplier of 20 years and multiplicand of KShs.5,000/=.

8. The Appellant urged the sum awarded was excessive as there was no proof of medical documents to prove that the deceased died as a result of the accident to warrant such an excessive sum of Shs 20,000/= under pain and suffering and that the award of KShs.100,000/= under loss of expectation of life were the multiplicand of 20 years was used.

9. The Respondent on his part through the submissions dated 6<sup>th</sup> March 2018 urged that the Respondent proved the deceased's death by production of the deceased's death certificate; that the Respondent proved the deceased was involved in an accident on 7.1.2015 and died instantly. On loss of expectation of life, it is urged the deceased died at the age of 38 years and an award of KShs 100,000/= was proper and fair. On general damages for loss of dependency; the Respondent urged the multiplicand applied was proper.

10. I have very carefully considered the proceedings at the Lower Court, Counsel submissions and authorities relied upon, I shall as such consider the issues raised under the respective awards, under pain and suffering, loss of dependency; multiplier of 20 years and multiplicand of KShs.5,000/=.

11. On award of KShs.20,000/= for pain and suffering. the Appellant urges an award of KShs.20,000/=

was excessive and proposes KShs.10,000/= whereas the Respondent insists that the award of KShs.20,000/= is proper. There is uncontroverted evidence from PW1's evidence and post mortem Report exhibit, Death Certificate exhibit 3 and Police Abstract exhibit 4, that the deceased died instantly at the scene of accident was taken to the mortuary after the road accident, that if the deceased felt any pain it must have been minimal. I find an award of KShs.20,000/= was excessive and reduce it to Shs.10,000/=.

12. On loss of expectation of life, the Trial Court awarded KShs.100,000/= which the Appellant urged is excessive and should be reduced to KShs.70,000/=. The Respondent did not agree. The Appellant has not urged why an award of KShs.100,000/= is excessive for loss of expectation of life for the deceased who died at the age of 38 years. The death certificate exhibit 3 reveals the deceased died at the age of 38 years. I have considered the authorities relied upon and evidence on record and find an award of KShs.100,000/= for loss of expectation of life would be proper.

13. On loss of Dependency the Trial Court applied a multiplier of 20 years and multiplicand of KShs.5,000/=. The Appellant urged that both multiplicand and the multiplier are excessive. The deceased was a watchman aged 38 years. In Kenya there is no prescribed retirement age of a watchman. Indeed, in Kenya most of the watchmen are passed retirement age and can even work upto 75 years. The Trial Court held the deceased would have worked as a watchman upto around the age of 55. I find that reasonable though at 55 years most of the watchmen would consider themselves strong enough to continue working for the next 10 to 15 years. I shall therefore adopt the multiplier of 20 years as found by the Trial Court and find that it is fair and reasonable on the deceased's earnings, PW1 alleged the deceased was a watchman with dependants as per Chief's letter exhibit 6. He produced grant of letters of administration intestate and police abstract as exhibits. He urged the deceased earnings were KShs.10,000/= per month but did not produce payslip or employer's letter to prove the deceased's earnings.

14. In case of **Philip Wanjera & Another v. Ahmed Libah & Another**, HCCA No. 343 of 2014, the Court held thus:

***“No documentation was produced to show that she earned KShs.15,000/= per month. While I am alive to the fact that a farmer may not have any payslips or books of accounts to prove her earnings or any documentation for that matter, the onus of proof rests with the respondent to prove that she was indeed a farmer. However, in broad interest of justice I am inclined to apply the Government Minimum Wage Guide for unskilled labourers. The Regulation of Wages (Agricultural industry) 2008 provides for KShs.5,000/= for unskilled employee.”***

15. In the instant case, PW1 did not produce any document to confirm the deceased was a watchman earning KShs.10,000/= per month as a watchman. That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor are they issued with salary slips or sign payment vouchers as regards their earnings but it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind non production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of non production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings will be insisted on.

16. In the case of **Jacob Ayiga Maraja and Francis Karani v. Simeon Obongo (Suing as the Administrator of the estate of Thomas Denga Obondo C.A. No. 167 of 2002 (Kisumu)**, The Court of Appeal stated thus:-

***“In our view, there was more than sufficient material nor record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about KShs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the***

*only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.*

*In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we know of no law or any other requirements that a self-employed compensator must retire at age 55.”*

17. In view of the above, I find and hold the income of KShs.5,000/= applied by the trial Court as earning of the deceased who was a watchman was proper and correct. This Court shall therefore adopt the multiplier of 20 years and multiplicand of KShs.5,000/=.

18. As regards the correct principle regarding awards under Fatal Accidents Act and the Law Reform Act and in dealing with principle of duplication of awards, this principle in **kemp & kemp on Damages** is clearly stated to be that where a claim is made under both the Fatal Accidents Act and the Law Reform Act, and where claimant succeeds in both, the award made under the Law Reform Act must be deducted in full from the award made under the Fatal Accidents Act as the deceased’s estate cannot benefit twice. In the instant case, both sides have not appreciated the law and have in their respective submissions not appreciated the principle and did not cite the law in support in urging their submissions nor did they urge the Court to do so in this matter. I cannot nevertheless shut my eyes on the law but have to apply the same to the letter.

19. In the case of **Hellen Waruguru Waweru** (suing as the legal representative of **Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited, Nyeri C.A. Civil Appeal No. 22 of 2014 [2015] eKLR**, the Court stated:-

*“This Court has explained the concept of double compensation in several decisions and it is surprising that some Courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependent under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”*

20. The Upshot is that the appeal succeeds partly. I hereby set aside the decision of the trial Court on quantum by substituting it with an award of KShs.822,100/= to the Respondent. The award is therefore tabulated as follows:-

**(a) Liability 100 percent against the Appellant**

**(b) General Damages**

<b>(i) Pain and suffering</b>	-	<b>KShs. 10,000.00</b>
<b>(ii) Loss of expectation of life</b>	-	<b>KShs. 100,000.00</b>
<b>(iii) Loss of Dependency</b>	-	<b>KShs. 800,000.00</b>
<b>(iv) Special Damages</b>	-	<b><u>KShs. 22,100.00</u></b>
<b>Total .....</b>	-	<b>KShs. 932,100.00</b>

**(c) Less award under Law Reform Act KShs.110,000.00**

***(d) Net Total due***

**KShs. 822,100.00**

21. The Appellant gets half costs at the lower scale as he succeeded partially in this appeal. The Respondents gets costs of the Lower Court with interests.

**DATED AND SIGNED AT SIAYA THIS 20<sup>th</sup> DAY OF APRIL, 2018.**

**HON. J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 20<sup>TH</sup> DAY OF APRIL, 2018.**

**IN THE PRESENCE OF:**

**Mr. Ondego: for the Appellant**

**Mr. Odino: for the Respondent**

**Court Assistant:**

**1. Laban Odhiambo**

**2. Brenda Ochieng**

**HON. J. A. MAKAU**

**JUDGE**