



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 112 OF 2014

CORAM: D.S. MAJANJA J.

BETWEEN

TOBIAS ODOYO OBURU.....APPELLANT

AND

JANE KERUBO MIRUKA &

PETER NYABUTO ONYWOKI suing as the legal representatives of

JOHN ONYWOKI SANGANYI (Deceased).....1ST RESPONDENT

MARY NJUGUNA WANGARI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, CM dated 8th September 2014 at the Chief Magistrates Court at Kisii in Civil Case No.136 of 2013)

JUDGMENT

1. The deceased died as a result of a road traffic accident that took place on 2nd May 2012 along the Kisii-Kilgoris road. He was passenger in motor vehicle registration number KAZ 656Z when the appellant's motor vehicle registration number KAH 254 A collided with the 2nd respondent's motor vehicle registration number KAZ 884S which then collided with the motor vehicle the deceased was a passenger. As a result of his death, the 1st respondents claimed damages from the appellant and 2nd respondent under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. The issue of liability was settled by consent recorded in the ratio of 80:20 against the appellant. Thereafter the court assessed damages and made the following award which has led to this appeal;

Pain and Suffering	Kshs.	4,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency	Kshs.	1,120,000/-
Funeral Expenses	Kshs.	30,000/-
Special Damages	Kshs.	20,000/-
Total	Kshs.	1,310,000/-
Less 20%		
TOTAL	Kshs.	1,048,000/-

2. At the hearing of this appeal, Mr Mbeka, counsel for the appellant, submitted that the appellant was only challenging the multiplicand in the award for loss of dependency. He further submitted that the 1st respondents did not prove that the deceased was earning Kshs. 25,000/- as pleaded hence the trial magistrate ought to have adopted Kshs. 8,000/- as he multiplicand based on the minimum wage. Counsel urged the court to find that Kshs. 10,000/- awarded as a multiplicand was inordinately high.

3. Ms Kusa, counsel for the respondent, opposed the appeal. She submitted that the uncontroverted evidence showed that the deceased was a plumber earning Kshs. 25,000/- per month. In view of the evidence, she contended that there was no reason to rely on the minimum wage hence the amount awarded was reasonable in the circumstances.

4. The determination of the multiplicand is a question of fact. The 1st respondents pleaded that the deceased was aged 43 years old, working as a plumber and earning approximately Kshs. 25,000/- per month. The only person who gave evidence was the deceased's brother, Peter Nyabuto Onywoki (PW 1). He testified that deceased died at the age of 43 years and left behind a wife and children. He did not state what kind of work the deceased was doing or what he was earning. The only evidence that he was a plumber was the deceased's certificate from Gusii Institute of Science and Technology which showed that he was awarded a certificate in plumbing. The trial magistrate held that, "[T]here are no documents of proof and there is no evidence to support the fact that he had a constant income. I shall find an income of Kshs. 10,000 to be reasonable per month."

5. The appellant accepted the fact that the deceased was a plumber. The point of contention is the income he was earning prior to his death. The Court of Appeal has held that it would be wrong to insist on documentary evidence to prove income where there evidence that the deceased was employed or in business (see **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR**). However, this is a case where the actual income of the deceased was not proved. Neither PW 1 or the deceased's wife testified as to the level of the deceased's income. In the circumstances, the proper point of reference was the minimum wage. I find support for this proposition in **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J., stated, "In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005" [Emphasis mine]. In fact, the 1st respondents relied on the **Regulation of Wages Order, 2012** in its submissions before the trial court. Therefore the proper multiplicand in these circumstances is Kshs. 8,834.20 being the minimum wage for an ungraded artisan outside the key urban areas.

6. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or failed to consider a relevant fact or that the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

7. In this case, I have found that there was no evidence of the actual income hence the trial magistrate ought to have reverted to the minimum wage to determine the multiplicand. There was no basis upon which he arrived at the multiplicand of Kshs. 10,000/-.

8. I allow the appeal to the extent that I set aside the multiplicand of Kshs. 10,000/- and substitute it with an award of **Kshs. 8,835/-** per month. The total amount for loss of dependency shall therefore be **Kshs. 989,520/- (Kshs. 8,835 X 12 X 13 X 2/3)** subject to 20% contribution.

9. The appellant shall have costs of this appeal assessed at Kshs. 20,000/-.

DATED and DELIVERED at KISII this 28th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Mbeka instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Kusa instructed by Khan and Associates Advocates for the 1st respondent.