



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.110 OF 2014

TOBIAS ODOYO OBURU.....APPELLANT

-VERSUS-

**SAMSON KAMAU ONUKO & ANOTHER (Suing as legal representative
of HELLEN MONG'ARE ONUKO).....RESPONDENT**

MARY NJUGUNA WANGARI.....RESPONDENT

(Appeal from the judgment and decree of the Honorable Njoroge in Kisii CMCC NO.21 of 2013 delivered on the 8/09/2014)

JUDGMENT

1. The appellant herein being dissatisfied with the judgment of the Chief Magistrate in Kisii CMCC No. 21 of 2013 delivered on the 8/9/2014 has appealed against quantum of damages awarded. Parties recorded a consent on liability in the ratio of 80:20 in the lower court. The respondent was awarded 20000/- for pain and suffering, 100,000/- for loss of expectation, Kshs, 1,298,496/ for loss of dependence, 30,000/- funeral expenses and 20,000/- special damages total being Kshs.1,486,49.00 less 20% the net total was Kshs.1,174,796.80 plus costs and interest.

2. The appellant's grounds of appeal are as follows;

- i. 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
- ii. The Learned 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.
- iii. 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.
- iv. 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.
- v. 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.

3. At the hearing of this appeal Mr Mbeka referred to the 5 grounds of appeal and submitted the appeal is on quantum on loss of dependency and special damages. That under the loss of dependency the respondent proved that the deceased was a teacher aged 49 years. The payslip produced indicated that the deceased's earned a basic pay of Kshs.20, 289.00. That the trial magistrate used the said sum to calculate the amount awarded as loss of dependency. That the trial magistrate failed to deduct the statutory sums as provided in the payslip which are; NHIF-Kshs.320.00, PAYE- Kshs.2168.00. That if the said sum were deducted the sum left would have been Kshs.17, 801.00 which ought to have been the multiplicand. That the multiplier is reasonable and the ratio of dependency of 2/3 too is reasonable. On special damages it was submitted that the same was not proved as the plaintiff pleaded a sum of Kshs 50,000/- but only produced receipts of Kshs. 1,300/- which should have been awarded instead of the sum of Kshs.30,000/-.

4. Miss Kusa for the respondent in response submitted that apart from the basic salary there is the medical allowance and the commuter making the total sum as Kshs. 25627.00, that if you deduct the said sums and the statutory deductions the balance is Kshs.23425.00. That NHIF is an investment which would go to the benefit of the beneficiary and should not be deducted. That the trial court used the sum of Kshs.20289 .00 which is on the lower side and is not exaggerated. On special damages it was submitted that there is a receipt of Kshs.20,

000.00, that funeral expenses were pleaded at Kshs.30, 000.00. That even if there was no receipt funeral expenses are unavoidable and sums are usual spent at funeral and the court ought not to follow strict rules on special and that Kshs. 30,000.00 is a reasonable figure.

5. There are just two issues for determination in this appeal the portion of salary which the trial court ought to have used as the multiplicand and whether special damages was proved. At paragraph 6 of the plaintiff plaint dated the 13th January 2013 the plaintiff sought damages under the Fatal Accidents Act and the Law Reform Act. At paragraph 6 (b) it is indicated that the deceased was 49 years old she was earning appropriately Kshs. 25,000.00. The trial court stated that the deceased was earning a good salary of Kshs. 20289.00 and used the said salary with a multiplier of 8 to award the sum of Kshs.1, 298,496.00. I have been referred to the deceased's payslip. The payslip produced shows that the deceased total earnings was Kshs. 25,627.00, her basic pay was Kshs.20289.00 and her net earnings after deductions was Kshs. 15739.00 leaving a net pay of Kshs. 9888.00 .In the case **Chunibhai J Patel and Another vs. PF Hayes and Others (1957) EA 748, 749** where the Court of Appeal stated that;“ ***The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children.***

The trial court used the basic pay of Kshs. 20289.00 however being guided by the above Court of Appeal decision the sum that was to be used is the net income which is Kshs. 20289.00 less the statutory deductions of Kshs. 320.00 and the 2168.00 this gives a sum of Kshs. 17801. 00. The appeal is allowed on this limb only. The sum the respondent is entitled to is $Kshs.17,801.00 \times 12 \times 8 \times 2/3 = 1,139,264.00$ less 20%. The plaintiff also sought special damages of Kshs. 50000.00 for funeral transport, post mortem mortuary fees and other related expense and Kshs. 20.000.00 for legal fees. The trial court awarded a sum of Kshs. 30000.00 as reasonable funeral expense. When one dies the family expend varies amounts of money. I know that it is trite law that special damages must be pleaded and proved, in my view the sum awarded of Kshs 30,000/ was reasonable. There is a receipt of Kshs. 20000.00 showing that the respondent paid the firm of Ms Khan and Associates a sum of Kshs. 20000.00 being payment for professional fees for letters. This claim was proved.

6. I therefore set aside only the award under loss of dependency and substitute it with the sums of Kshs.1,139,264.00 less 20% = **911411.20**.The amount shall accrue interest from the dated of judgment of the subordinate court. The appellant is awarded 1/3 of the one third of the appeal costs.

Dated signed and delivered this 28th day of September 2018.

R.E.OUGO

JUDGE

In the presence of;

The appellant absent

Mr. Kianayo For the Respondent

Ms. Rael Court clerk.