



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 89 OF 2014

CORAM: D.S. MAJANJA J.

BETWEEN

TOBIAS ODOYO OBURU.....APPELLANT

AND

CALLEN KWAMBOKA OKEMWA & KERUBO OBWOGE suing as the legal

representatives of OBED OKEMWA OBWOGE (Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, CM dated 7th July 2014 at the Chief Magistrates Court at Kisii in Civil Case No. 268 of 2012)

JUDGMENT

1. The fact that the deceased, Obed Okemwa Obwoge, was fatally injured in a road traffic accident on 2nd May 2012 while travelling in a motor vehicle registration number KAZ 656Z belonging to the appellant along the Kisii – Kilgoris road is not in dispute. The said vehicle collided with another vehicle registration number KAH 254A. As a result of his death, the respondents claimed damages from the appellant 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 was agreed in the ratio of 70:30 against the appellant. Following assessment of damages, the trial magistrate made the following award:

Pain and Suffering	Kshs.	10,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency	Kshs.	1,600,000/-
Special Damages	Kshs	53,000/-
Less 30% contribution		
TOTAL	Kshs.	1,234,310/-

2. This appeal is principally against the award of damages. Although the memorandum of appeal raised broad issues regarding the award of damages, Mr Mbeka, learned counsel for the appellant, submitted that he was only challenging the multiplier and the multiplicand awarded for loss of dependency under the *Fatal Accidents Act*. Counsel submitted that the deceased was aged 45 years old thus the multiplier of 20 years awarded was excessive. Counsel cited several cases to support this contention including the case of *James Wambura Nyikal and Another v Mumias Sugar Company Limited and Another NRB HCCC No. 248 of 2005[2011]eKLR* where the deceased was aged 45 years and a multiplier of 6 years was applied in that case. He suggested that a multiplier of 10 years would be reasonable in the circumstances. As regards the multiplicand, counsel urged that the respondent failed to prove the deceased's income therefore the court ought to have awarded the minimum wage applicable at the time hence the sum of Kshs. 10,000/- awarded was excessive.

3. Mr Nyangosi, counsel for the respondent, supported the judgment and submitted that the award was not excessive to justify intervention by the appellate court. Counsel pointed out that the appellant did not file any submissions before the trial court to support its case for the multiplier. In his view the deceased was self-employed and was not bound by the retirement of 60 hence the multiplier was justified. He also supported the multiplicand as it was based on the evidence.

4. 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**). **Applying this principle to the case at hand, I interfere only with the multiplier.**

5. It is common ground that the deceased was 45 years old at the time of his death. 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**, the Court of Appeal held that the choice of multiplier is a matter of the court's discretion which must be exercised judiciously. Likewise, in **Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR**, the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life if the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents.

6. Although, the authorities cited by the appellant provide a guide ultimately each case is decided on its own facts. The trial magistrate held that the deceased, "would have lived up to the age of 70 years, due to uncertainties in life I shall consider a multiplier of 20." In my view the trial magistrate erred by adopting the age of 70 years not as the working life of the deceased but the age which he would have lived. The trial magistrate did not take into account the factors I have outlined above in reaching the multiplier of 20. I hold that taking into account the normal working life of a Kenyan male which is 60 years, the expected dependency and other imponderables I would consider a multiplier of 12 years reasonable in the circumstances.

7. The trial magistrate came to the conclusion that the deceased did not prove income but held that being a pastor and businessman, he would award Kshs. 10,000/-. The respondent did not cross-appeal on this issue. On the other hand, the respondent did not submit on this issue before the trial court or show the court below the applicable Regulation of Wages Order. I therefore decline to intervene in the matter.

8. In light of the finding, I allow the appeal to the extent that I set aside the award for loss of dependency under the **Fatal Accidents Act** and substitute the same with the following award of **Kshs. 960,000/-** made up as follows Kshs. 10,000/- X 2/3 X 12 X 12 which shall be subject to the agreed contribution.

9. The respondent shall pay costs assessed at Kshs. 20,000/-. The amount awarded shall accrue interest at court rates from the date of judgment.

DATED and DELIVERED at KISII this 26th day of September 2018.

D.S. MAJANJA

JUDGE

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

Mr Nyangosi instructed by T. O. Nyangosi and Company Advocates for the respondent.