



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 159 OF 2015**

**COMMERCIAL TRANSPORTERS LTD.....APPELLANT**

**VERSUS**

**DORCAS ADOYO OWITI**

**CLEMENT ODENYO NGALA.....RESPONDENT**

**J U D G M E N T**

1. On the 15/3/2013, along Mombasa Voi road, one Thomas Okal Odoyo, deceased was travelling aboard motor vehicle Registration No. KBT 9915, when there occurred a collision between that motor vehicle and a motor vehicle KUP 224 hauling trailer No. ZA8751. It was pleaded and alleged in the plaint that the collision was caused and occasioned by the negligent manner the motor vehicle KPU 224, was driven, managed and controlled. Particulars of negligence were given just as much as particulars of dependants and special damages. On income of the deceased, it was pleaded, that prior to the death he was gainfully employed in his business venture as a Clearing and Forwarding Agent and earned Kshs.20,000.00 per month.

2. Based on the facts pleaded the plaintiff prayed that judgment be entered for her against the defendant for special damages in the sum of Kenya shillings 99, 550/= plus general damages under both Fatal Accidents Act and Law Reform Act.

3. The Respondent as, defendant then, upon service did enter appearance and filed a statement of defence, now found at pages 18 and 19 of the Record of Appeal. That defence admitted the occurrence of the accident involving the two motor vehicles and on the date pleaded but denied all the allegations including the particulars of negligence, particulars pursuant to Law Reform Act, the injuries suffered as well as the particulars of special damages and the fact that the deceased was a passenger in the motor vehicle KBT 991S. For good measure the defendant then alleged negligence against the driver of motor vehicle KBT 991 S and gave the particulars thereof. There was, after the statement of defence filed a Reply to Defence which essentially denied any contributory negligence on the deceased.

4. Parties filed witness statements and lists of documents and at trial only the Respondent was called to give evidence because the parties had by consent entered judgment on liability at 60:40 in favour of the plaintiff. The evidence of the Respondent was thus largely to lay basis for the assessment of quantum of damages which is the only issue in this appeal.

5. In her evidence the Respondent said that she was a housewife, that the deceased died aged 44 years and left her with four children all school going and that the deceased was a businessman doing the business of

clearing and forwarding. She produced document to show that as a result of the death, she paid mortuary charges, transport costs to the burial site. Equally produced was proceedings in a traffic case in which the driver of the appellant was charged and convicted on own plea of guilt. On cross examination the witness said that the transport costs are shown to have been paid by one Walter Okutu who was the Chairman of the burial committee and that at the time of his death the deceased had Saccos Savings of Kshs.59,000/=. On cross examination she approximated the sum of upkeep and deposits to be Kshs.20,000/- per month.

6. Based on the pleadings and the evidence led and subject to the agreed apportionment of liability the trial court assessed and awarded to the Respondent damages in the sum of Kshs.4,269,000 but particularized as follows:-

<b>Pains and suffering</b>	<b>10,000.00</b>
<b>Loss of expectation of life</b>	<b>150,000.00</b>
<b>Lost dependency</b>	<b>4,269,000.00</b>
<b>Special damages</b>	<b>119,000.00</b>

The first obvious mistake is apparently both typographical, arithmetic and failure to factor the agreed contribution.

7. In the judgments, having adopted the multiplier formular the trial court arrived at a figure of Kshs.4,000,000.00. However in the summary this has been captured as Kshs.4,269,000. Both figures are clearly wrong on both calculations and capture. The calculation should give the sum of Kshs.3,360,000. That would have been the first reason to interfere with the assessment as the basic arithmetic's are overtly and undeniably incorrect.

8. That notwithstanding, I will delve into the merits of the appeal as revealed in the memorandum of appeal and the submissions rendered. Based on the submissions rendered there are four issues that isolate themselves for determination by the court. These are:-

- a) Whether the trial court erred in assessing damages under lost dependency at Kshs.4,000,000.00**
- b) Whether the trial magistrate erred assessing damages for loss of expectation of life at Kshs.150,000.00**
- c) Whether or not the trial court in awarded damages without regard to the fact that those damages vested on the same persons and without regard that it was a lump sum payment due for investment.**
- d) Whether there was proof of special damages in the sum of Kshs.119,000.00**

9. This being a first appeal, the Court proceeds by way of a retrial with the aim of coming to own conclusion without necessarily setting out to agree or disagree with the trial courts finding and always being guided by the evidence on record which it is bound to reevaluate and re-access afresh. The court also bears in mind that the task of assessment of damages for personal injury claims or indeed loss of life is an exercise in judicial discretion and an appellate court would not lightly, easily and freely interfere unless it be demonstrated that there was an error in principle or that the award so reached was overtly and evidently so do proportionate and incommensurate with the damage suffered.

10. In his judgment, the trial court said:

**“The first stage in the assessment of dependency is to find the multiplicand. I take it that the deceased was spending most of his earnings on his dependants, say 2/3 of his income. On**

monthly income, there was no fixed amount of income but it is judicial notice that businessmen are earning more than employed persons. Their monthly earnings vary depending on the intensity of efforts he has put into his business but more accurately, will depend on the forces of demand and supply in the market. All in all a man driving a car is a man or businessman who would probably be earning a minimum of Kshs.20,000/- per month. I agree with the counsel for the plaintiff that Kshs.20,000/= is a very reasonable multiplicand. Being a businessman, there is no retirement age. Many will work actively even at the age of 70 years but for the sake of this case I do not want to go to that extent because my pecuniary jurisdiction will accommodate me. I will take 65 years minus 44 years leaving 21 years of active business life. Hence,  $20,000 \times \frac{2}{3} \times 21 \times 12 = \text{Kshs.4,000,000/=}$  under this heading”.

11. In answering the first issue, this court has posed the question, did the trial court error in line choice of multiplier, multiplicand and dependency ratio and therefore arrived at a sum that was exaggerated, exorbitant and demonstrably high? The starting point is that the choice of a multiplier is a matter of judicial discretion vested on the trial court. In this case the trial court found that there is no guaranteed or set retirement age for persons engaged in own business. He therefore set the age of 65 years as the age at which, in his discretion, the deceased would have slowed down. I find no demonstrated error in that exercise of discretion.

16. On the multiplicand, the trial court found and settled on the sum of Kshs. 20,000.00. In coming to that figure the trial court took into account and appreciated that a man who drove a car was probably earning a minimum of Kshs.20,000/=.

15. On this finding one only need to follow the words of the court of Appeal in the case of *Jacob Anyiga Naruja vs Simeon Obonyo [2005] eKLR* that documentary evidence is not the only proof of earnings. One only need appreciate that the deceased had a family with a wife who was willing to be a housewife so long as the husband provided but was very fast to get a job after his death. All in all I find no error in the manner the trial court settled for the multiplier, multiplicand and the dependency ration.

14. Having said that however, the calculations do not just add up using those parameters adopted by the trial court from the multiplier formula, I would work out damages for lost dependency as follows:-

$$20,000 \times 21 \times 12 \times \frac{2}{3} = 3,360,000.00 \text{ and not Kshs.4,000,000/=}$$

This determination addresses grounds 1, 2, 3, 4, 5 & 6 of the Memorandum of Appeal.

15. On ground 7, the award was wholly in the province of the judicial discretion of the trial court. This court holds the stand that there is no dogma that loss of expectations of life must be a specific sum. I am also unaware of any statute limiting the court's jurisdiction to award a particular sum under this head. In *Alajandro Campon vs Swaleh Brok Islam & Another [2016] eKLR* this court had while relying on the Court of Appeal decision in *KPA vs Beryl Beltha Malowa* and awarded a sum of Kshs.150,000.00 for loss of expectation of life for a man aged 25 years at death.

16. The award by the trial court was evidently within the range of awards for that head and I appreciate having read awards by the High Court and confirmed by the court of Appeal of upto Kshs.200,000/=. To this court there is no merit in this ground. The award is not manifestly high as to depict an error in principle.

17. On special damages the trial court did receive evidence by way of receipts and documents to wit:-

**Mortuary Charges                      Kshs.19,000.00**

**Hire of bus for transport    Kshs.65,000.00**

**Fuel for the buses                      Kshs.33,000.00**

<b>Meeting Hall</b>	<b>Kshs. 1,000.00</b>
<b>Police Abstract</b>	<b>Kshs. 100.00</b>
<b>Death Certificate</b>	<b><u>Kshs. 1,000.00</u></b>
<b>TOTAL</b>	<b><u>Ksh.119,100.00</u></b>

18. To this court the sums proved was Ksh.119,100.00 yet the court awarded Kshs.119,000.00. I do not think that the Appellant is justified in contending that special damages were never proved by documentary evidence. This ground must have been those standard grounds taken and included in the Memorandum devoid of the facts and oblivious of the court records. This ground equally fails.

19. However the parties had by consent agreed to opposition liability at 60:40 in favour of the plaintiff. This I understand to mean that the plaintiff conceded contribution of upto 40%. That was clearly an agreement between the parties and the court had the inescapable duty to enforce. The total sum awarded ought to have been subjected to the agreed apportionment. It was not subjected. To that extent, the court erred and being a first appellate court I must right that error. To that extent then I rework the damages due as follows:-

<b>General damages for pains &amp; suffering</b>	<b>Kshs. 10,000/=</b>
<b>General damages for loss of expectation of life</b>	<b>Kshs. 150,000/=</b>
<b>Loss of dependency</b>	<b>Kshs.3,360,000/=</b>
<b>Special damage</b>	<b><u>Kshs. 119,000/=</u></b>
<b>TOTAL</b>	<b>Kshs.3,639,000/=</b>
<b>Less 40% contribution</b>	<b>Kshs.1,455,600/=</b>
<b>Net due</b>	<b>Kshs.2,183,400/=</b>

20. The award of general damages will attract interest at court rates from the date of Judgment by the lower court till payment in full.

While the special damages will attract interest at court rates from the date the suit was filed.

21. I award to the Appellant ½ costs of this appeal while the Respondent gets the costs of trial before the lower court.

**Dated** and delivered at **Mombasa** this **28<sup>th</sup>** day of **March 2017**.

**HON. P. J. O. OTIENO**

**JUDGE**