



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 53 OF 2013**

**ABDALLA RUBEYA HEMED.....APPELLANT**

**VERSUS**

**KAJUMWA MVURYA & KULALA MVURYA**

**(suing as legal representative of the estate of**

**JUMAA MVURYA MWAMTUTU(DECEASED).....RESPONDENT**

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

1. In this appeal the appellant challenges the trial court's determination by which the court found the appellant liable to the Respondent at 80% and awarded to the Respondent damages in the aggregate sum of Kshs. 1,040,000/= made up as follows:-

<b>Special damages</b>	<b>Kshs. 60,000.00</b>
<b>Pains and sufferings</b>	<b>Kshs. 20,000.0</b>
<b>Loss of expectation of life</b>	<b>Kshs. 120,000.00</b>
<b>Lost dependency</b>	<b><u>Kshs. 840,000.00</u></b>
<b>TOTAL</b>	<b><u>Kshs.1,040,000.00</u></b>

2. Against that judgment the appellant now faults the trial court for reasons that; the court erred in apportionment of liability; that lost dependency was never proved; that special damages had not been specifically (strictly) proved that the award of damages was erroneous for being manifestly excessive and lastly that the trial that erred in law in failing to give due regard to the Appellants submissions. The appellant therefore seeks from court the determination on the following issues:-

- i) Whether or not there was an error in the finding on apportionment of liability?**
- ii) Whether the special damages were properly proved in accordance with the law.**
- iii) Whether the Respondent met his onus and burden in proving dependency to be entitled to damages for lost dependency.**

**iv) Whether or not the damages awarded were so high as to be manifestly excessive.**

3. I will endeavor to consider the grounds of appeal seriatim and will in that endeavor seek to resolve ground 5 which I think run through all the grounds and cannot be considered independently and in isolation. To help me undertake the task I have read the record of the trial court, the judgment and the submissions filed by the parties in this appeal, and without having to rehearse the evidence proceed to address the identified issues.

**Finding on liability**

4. The evidence on how the accident occurred and how the deceased met his death is straight forward and common to both sides. It is as given in the account of PW 2, that the deceased tried to jump after the vehicle lost control and the vehicle landed on him. In his judgment, the trial court addressed the issue of liability in the following terms:-

**“The defendant denied having employed the deceased claiming he was picked by the driver on the way. But the said driver was never called to confirm that. On the other hand PW 1 said the deceased was indeed employed by the defendant as a turn boy and it is more probable than not that he was as that is the only reason he was traveling in a vehicle carrying scrap metals. Even if he was not the defendant’s driver authorized him to board the vehicle. It is therefore my finding that he was lawfully traveling therein”.**

5. The appellant faults the trial court on allegations that there was no evidence how the accident occurred hence liability ought to have been shared equally. In the circumstances of this case the only way to determine the causation of the accident is to establish at the proximate cause of the accident.

6. In my opinion, what triggered the deceased to jump of the lorry and be crushed by the lorry was what is described by the witness as the loss of control over the control of the motor vehicle by the driver. In negligence, one is deemed to and presumed to intend the natural and obvious consequence of his acts of omission or commission.

7. The only evidence is that when the driver had lost the control of the motor vehicle, the deceased, reacted as any reasonable person would in the circumstance, by jumping out of the motor vehicle and therefore, away from imminent peril only for the vehicle to land on him and crush him.

8. I find that had the driver kept control of the motor vehicle, there would have been no need for the deceased to jump. Even after jumping had the driver controlled the motor vehicle so as to steady it and restrain it from overturning there would not have been inflicted upon the deceased the fatal injuries. In this case, I find no break or interruption between the Appellants driver failure to maintain the control of the motor vehicle and its over-turning and crush-landing upon the deceased.

9. To this court, the reaction of the deceased in jumping out from the motor vehicle at that heat of the moment was not only reasonable but also the natural reaction any prudent person would have taken to avoid the vehicle plunging into water while he was aboard or to avoid the vehicle coming into collision with another object while he was aboard. This decision and finding has been influenced by the definition of the phrase proximate cause or primary cause by Black’s Law dictionary 7<sup>th</sup> Edition which determines the phrase as:-

**“A cause that is legally sufficient to result in liability. A cause that directly produces an event without which the even would not have occurred”.**

10. This being a first appeal, and having re-examined and re-appraised the totality of the evidence availed at trial, I find that the accident and resultant fatal injury was the direct result of the failure by the Appellants driver to maintain the firm and expected control of the motor vehicle. For this finding I do not agree with the trial court that the deceased contributed to the accident and the death. Mere jumping out was not the cause of death but the death was caused by the motor vehicle falling on the deceased. One

only need to add that a motor vehicle properly and carefully steered would not tilt or just overturn. It only overturned when the control thereof was lost. For a driver to lose the vehicle it is his duty to control, is a clear evidence of negligence.

11. I dismiss this ground of appeal by the appellant and substitute the trial court's finding on liability at 80:20 with a finding that the appellants driver was 100% to blame for the accident.

### **Special damages**

12. In ground 3 of the Memorandum of Appeal the appellant faults the trial court for awarding to the Respondent special damages when the same had not been specifically proved. The law as I understand it is that special damages need to be specifically pleaded and strictly proved. The plaint dated 10/8/2009 at paragraph 7 specifically pleaded the sum of Kshs.60,200. At trial, PW 1 gave evidence that he procured a police abstract at Kshs.200 obtained grant of letters of administration at Kshs.15,000 and incurred funeral expenses in the sum of Kshs.45,000. For the said expenses, the only receipt produced was for police abstract.

13. In the judgment, the trial court delivered itself simply saying:-

**“I also award special damages of Kshs.60,200...”.**

14. It is not defendant to see that the trial court gave no reasons for awarding the sum of Kshs.60,200 as special damages. It was important to give reason noting that no receipts were produced as to amount to the common legal parlance of specific proof. However even in special damages, there are some expenses that are imposed by law or may just be taken judicial notice of as being of local notoriety as a practice among a people. That sum pleaded and awarded as special damages comprised two heads being cost of obtaining grant of letters of administration at Kshs.15,000 and funeral expenses of Kshs.45,000.

15. It was in evidence that an advocate was engaged and a grant of letters of administration was obtained in the name of the plaintiff. That grant was produced as exhibit P4. This court takes notice that there would be court fees to obtain the grant and that if an advocate is engaged legal fees are payable and there is a scale of fees under schedule 6 x paragraph 1a of the Advocate (Remuneration) Order. To this court the sum of Kshs.15,000 for costs of obtaining grant of letters of administration, which was mandatory to maintain a suit on behalf of the estate, is not exorbitant or unreasonable. Strict proof of special damages does not mean and should not be limited to proof by receipts.

16. On funeral expenses, the law allows a court under Section 60 of the Evidence Act to take judicial Notice of matter of local or general notoriety. I do not hesitate to take notice that most Kenyans of African origin do honour their Kins in death by feeding the mourners who attend to witness the last rites.

17. Besides this practice there was evidence that the deceased's remains were preserved at a mortuary and was later transported for burial at Kinango. I take it that Kinango is some 100 kilometre from Mombasa and that the body was not carried there on the shoulders of his relatives. There must have been hired a motor vehicle, a coffin must have been brought just like death certificate was produced but the cost thereof not claimed. These to me are inevitable expenses associated with the disposal of the deceased remains which I think every court has a right to appreciate the social context Kenyans of different cultural backgrounds operate in. While the principle keep resonating in my mind that special damages must be pleaded and specifically proved, I take note that the pleading was indeed made but no receipts were produced. However that should not be the only reason to deny a litigant an expenses reasonably spent unless it be demonstrated as utterly unnecessary. In this case I consider it necessary and imperative that the plaintiff had to spend money to have the remains of the deceased interred and that the sum of Kshs.45,000 was not unreasonable in the circumstances. Using the reasoning by the court of appeal in *Jacob Ayiga Waruja vs Simeon Obayo [2005] eKLR*, I hold that to insist that special damage must and can only be proved by way of receipts is to give the requirement of special proof to stringent determination. The totality of the foregoing is that I find no merit in this ground of appeal as well and I dismiss it.

## **Was loss of dependency proved?**

18. Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

19. In this appeal evidence was led and it was led and it was never controverted that the deceased was employed and would give to the mother Kshs.6,000 per month. In the judgment appealed from the court said:-

**“For the loss of expectation of life I award Kshs.12,000 as conventional amount. As for loss of dependency the evidence on record is that the deceased died aged 25 years while earning Kshs.10,000 per month and supporting his dependents among them the 1<sup>st</sup> plaintiff. Since there is no document to support his wages I take the then minimum wage of Kshs.7,000 as his monthly earnings. He would have continued earning and supporting them for another 15 years or so. Thus the amount I award herein is Kshs.7,000 x 12 x 15 = Kshs.840,000/=”**

20. In *Hussein Ahmed Hamshi & Another vs Peter GichuruNjoroge*[2016] eKLR, the court said of loss of dependency as a head of damages:-

**“.....dependency is a matter of fact. The trial court having received evidence that the deceased would give to the dependants Kshs.10,000 per month, to this court it was not open to the court that another sum be ascertained and subjected to a dependency ratio. To leave the known sum and venture elsewhere would be, with due respect to the trial court, to engage in undue speculation”.**

21. Using the same reasoning, since I have not changed my understanding of the Principles of awarding damages under this heading, I would say that in this matter there was ample evidence that the deceased would give the mother sum Kshs.6,000 per month. That to me was the extent of dependency of the mother and his younger siblings. The threshold was there glaring on the face of the court. It was there an unnecessary adventure to seek to ascertain the basic minimum wage and subject it to a dependency ratio. I however note that the deceased died unmarried and there was no evidence that he had decided to lead a celibate life. He would marry at some stage and maybe reduce his support to the mother and siblings. Those are relevant considerations any court is expected to take into account and taking into account means, beyond the dependency ratio, one considers the length of dependency. It is unfortunate that no ages of the dependants was given to guide the court on how long the dependency would persist.

22. It is however to this court expected that siblings would age and become independent and the mother, is ordinarily expected to exit life ahead of her children. The deceased was however shown to have been 25 years old, and the court adopted a multiplier of 15 years. In all fairness, and noting that the choice of a multiplier and other parameters of the multiplier formula, is a matter of judicial discretion, I see no error committed by the trial court. If anything a court being properly assisted by evidence of ages of dependants might as well have adopted a higher multiplier. I have said the court lacked the necessary assistance and must have done the best in the circumstances. I find no error in the adopted multiplier but find that there was an error in looking for minimum wage and subjecting same to a ratio. For that reason I will recalculate the sum under the heading as follows:-

$$6,000 \times 15 \times 12 = 1,080,000.00$$

23. One needs not cite any authority for the principle of law that the task of assessing damages is a difficult one and invite judicial discretion based on experience and should not be interfered with lightly by an appellate court. To this court the awards under pains and suffering as well loss of expectation of life as awarded by the court were within acceptable limits save for the typographical error in the figure 120,000.00. Even on the decisions cited for the court by the parties, I see no merit on the challenge to those awards just as I see no merit on the charge that the Appellant's submissions were not taken into account.

24. In the end, the appeal fails but the judgment of the lower court is set aside. The appeal having proceeded by way of retrial, the judgment is set aside and in its place substituted with a judgment as follows:-

**i) Judgment on liability is entered for the Respondent against the Appellant at 100%.**

<b>Special damages</b>	<b>Kshs. 60,200.00</b>
<b>Pains and suffering</b>	<b>Kshs. 20,000.00</b>
<b>Loss of expectation of life</b>	<b>Kshs. 120,000.00</b>
<b>Loss of dependency</b>	<b><u>Kshs.1,080,000.00</u></b>
<b>TOTAL</b>	<b><u>Kshs.1,280,200.00</u></b>

25. The sums for damages shall attract interest a court rates from the date of the judgment of the lower court till payment in full while special damages shall attract interest from the date of filling the suit.

26. The costs of this appeal are awarded to the Respondent.

27. It is so ordered.

**Dated** and delivered at **Mombasa** this **19<sup>th</sup>** day of **April 2017**.

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

**JUDGE**