



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 71 OF 2015

DISMUS OMOLO ODONGO AND ALICE AKELLO AKECH

suing as administrators/ personal representatives of

the estate of the late Jairus

Omondi Omollo (Deceased).....APPELLANTS

VERSUS

INTERIOR INSPIRATIONS LTD.....1ST RESPONDENT

AMARDEEP SINGH.....2ND RESPONDENT

ALI HASSAN.....3RD RESPONDENT

***(Being an Appeal from the Judgment of Hon. A.A.Odawo (RM) delivered on 14th July 2015 in Kisumu
CMCC NO. 425 of 2013)***

JUDGMENT

Dismus Omolo Odongo and Alice Akello Akech sued (*hereinafter referred to as appellants*) sued Interior Inspirations Ltd, Amardeep Singh and Ali Hassan (*hereinafter referred to as respondents*) in the lower court claiming damages for fatal injuries suffered by their son **Jairus Omondi Omollo (Deceased) on 16th December 2012 when motor vehicle KBG 959 K which was registered in the name of the 1st respondent; was in control and possession of the 2nd respondent, was negligently driven by the 3rd respondent as a result of which it collided with motor cycle KMCE 345 T in which the deceased was a pillion passenger.**

The defendants/respondents filed a joint statement of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on **14th July 2015**, the learned trial Magistrate found and awarded the appellant general damages in the sum of Kshs. 280,000/- which was subjected to the agreed 80:20% liability ratio in favor of the appellants against the respondents jointly and severally leaving a net balance of Kshs. 224,000/-.

The Appeal

The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed a Memorandum of Appeal dated 12th August 2015 which sets out 5 grounds of appeal to wit:-

- 1) The Learned Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same
- 2) The Learned Magistrate misdirected herself in ignoring the principles in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants
- 3) The Learned Magistrate proceeded on wrong principles when assessing damages to be awarded to the appellants
- 4) The Learned Magistrate erred in awarding a sum in respect of damages which was inordinately low in the circumstances
- 5) The Learned Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and therefore arrived at a decision unsustainable in law

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 20.6.17; the parties' advocates agreed to canvass it by way of written submission which they dutifully filed.

Appellants' submissions

It was submitted for the appellants that the learned trial magistrate erred in not awarding damages for loss of dependency. It was submitted that the trial court ought to have awarded global sum under this heading since the deceased did not keep records of his earnings from his bodaboda business. To this end, the appellants urged the court to award Kshs. 1,200,000/- and to this end relied on **D M M (Suing As The Administrator and Legal Representative of the Estate of L K M v Stephen Johana Njue & Another [2016] eKLR** where the court on appeal enhanced the sum of Kshs. 700,000/- to Kshs. 1,200,000/- for a 16 year old who was in school.

Respondent's submissions

It was submitted for the respondents that the learned trial magistrate's failure to award damages for loss of dependency cannot be faulted since appellants did not provide evidence that they were dependents of the deceased. The respondents relied on **Gerald Mbale Mwea v Kariko Kihara & another [1997] eKLR** where the Court of Appeal held:-

“The issue of dependency is always a question of fact to be proved by he who asserts it. We do not see how the two respondents can lawfully claim to have been the dependents of the deceased (who was 75 years old at the time of her death) when they owned their own farms or farm and when the first respondent was the manager of the deceased's coffee farm”.

It was further submitted that the court did not give an award on loss of dependency since the appellants did not plead that the deceased was a bodaboda rider. To this end; the respondents relied on **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** in which the Court of Appeal held:

“The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties”.

The evidence

I have perused the entire record of appeal and I notice that the appeal revolves around quantum which I shall consider as hereunder.

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727 . At P. 730 Kneller J.A. said:-**

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.

The only dependents for whose benefit a claim under Section 4(1) of the Fatal Accidents Act can be brought are a wife, husband, parent or child, a position that Asike- Makhandia J (as he then was) articulated very well in the case of **Multiple Hauliers Co Limited vs David Lusa [2012] eKLR** and which this court entirely agrees with. This court could not therefore have agreed more with the Appellants who are parents of the deceased on their submissions that they are deceased’s dependents within the meaning of the Fatal Accident Act.

Hence, this court wholly concurs with the Appellants’ submissions that the Learned Trial Magistrate erred in law in failing to award them damages for loss of dependency under the Fatal Act as there was clearly no legal basis for her to have done so. This court finds that the Learned Trial Magistrate misdirected herself on the principles of the law and there is need to make an award for damages of Loss of dependency under the Fatal Accidents Act. Since there is no evidence that deceased was in any form of employment, a global sum ought to be awarded. In the case of **Wesley Kipkoech Kendagor v Unistar Transporters Ltd HCCC No. 116 Of 2004** at Kericho; the deceased was aged 21 years old and been admitted at Eldoret polytechnic. He had not earned a living. He however used to assist his disabled mother at the farm. Justice Luka Kimaru (as he then was) in deciding the case was of the view that the estate of the deceased would be adequately compensated by being awarded a global sum of Kshs 500,000. As stated hereinabove, Gikonyo J, in **D M M (Suing As The Administrator and Legal Representative of the Estate of L K M v Stephen Johana Njue & Another (Supra)** enhanced the sum of Kshs. 700,000/- for loss of dependency to Kshs. 1,200,000/- for a 16 year old who was in school. The present case is distinguishable from the latter case since the deceased in this case was not in school although he was only 17 years old. Taking all factors in this case into account, I believe a global sum of Kshs 500,000 for loss of dependency under the Fatal Accidents would be reasonable compensation.

In the result the appeal is allowed to the extent that the dismissal of appellants’ claim under the Fatal Accidents is set aside and substituted with an award of Kshs. 500,000/-. The award for pain and suffering, loss of expectation of life and special damages remain the same. This award shall be subject to the agreed apportionment ratio of 80:20%. The appellants shall have costs of the appeal.

DATED AND DELIVERED THIS 21st DAY OF September 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellants - Mr Odeny

Respondents - Mr Omondi holding brief for Onyinka