



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 44 of 2014

FELISTUS KARITHE TITUS.....1ST APPELLANT

PAUL MUSILA MWANGANGI.....2ND APPELLANT

-VERSUS-

JOHN CHUMA.....1ST RESPONDENT

PATRICK KARIUKI..... 2ND RESPONDENT

*(An Appeal from the Judgment delivered by the Honourable S. Mungai, Chief Magistrate at Nakuru
CMCC No.897 of 2012 of the 5th day of March, 2014)*

JUDGMENT

1. The appellants (then plaintiffs) had sued the respondents (then defendants) for damages arising out of the death of one **Nicholas Mwangangi** (now deceased). The deceased met his death on 15th June 2012 in a road accident along Nakuru – Nairobi highway. He was hit by motor vehicle registration No. KBG 086A owned by the defendants. The trial court entered judgment in favour of the respondents and awarded damages as follows:

<i>Special damages</i>	-	36,500
<i>Pain & suffering</i>	-	20,000
<i>Loss of expectation of life</i>	-	80,000
<i>Lost years</i>	-	1,307,000
<i>Total</i>	-	1,443,500
<i>Less damages under the</i>		
<i>Law Reform Act</i>	-	100,000
<i>Net award</i>	-	1,343,500

The respondents also got costs of the suit.

2. The appellants were dissatisfied with the amount of damages awarded for lost years and filed the present appeal on the one ground that “*the learned trial magistrate erred in law and in fact in awarding a monthly earning of Kshs.4,666 instead of Kshs.7,000 per month which had been proved.*” They have asked the court to reassess the damages for lost years and enhance the same.

3. It is the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (**See *Selle & Another Vs Associated Motor Boat Co. Ltd & Another (1968 (E.A. 123)***). Further, an appellate court would not normally disturb an award unless it is satisfied that the court took into account an irrelevant factor or failed to consider a relevant factor or that the award was so inordinately low or high as to be an erroneous estimate of the damage. (See ***Arrow Car Ltd Vs Bimomo & 2 Others (2004) 2 KLR 101***. See also ***Kemfro African Ltd t/a Meru Express Service –Vs- A.M. Lubia & Another***).

4. It was the appellants’ submission tendered orally by learned counsel **Mr. Gekonga** was that the trial court relied on an erroneous multiplicand instead of Kshs.7,000 per month which was proved. He referred the court to page 70 of the record of appeal which shows that the deceased used to earn Kshs.7,000 which figure was not disputed. He submitted that the court in its judgment had acknowledged that the deceased earned Kshs.7,000 monthly. Counsel therefore submitted that there was no basis for the substitution and added that if the court had applied the correct multiplicand the award would have worked out to Kshs.1,959,999 which can be estimated at Kshs.2 million. Counsel referred the court to the list of authorities filed.

5. **Mr. Mburu** learned counsel for the respondents submitted that the court relied on evidence; that the letter purported to have been written showing the deceased’s earnings was not sufficient and that what was required were proper records showing earnings and tax deductions. He faulted the letter stating that the same had not been produced by the maker.

6. In response **Mr. Gekonga** submitted that the letter was not disputed at the trial and that it was not upon the appellate court to inquire into the tax deduction. He submitted that the respondents were estopped from questioning the production of the letter on appeal.

7. The only issue in this appeal is whether the court applied the correct multiplicand in arriving at the award for loss of earning.

8. The principles that guide the court in considering damages under the head of loss of earnings are well settled and have been anticated in various decisions. In ***Grace Kanini Mithini Vs KBS Ltd & Another Nairobi HCCC No.4708 of 189. Ringera J*** (as he then was) summarized the principles that guide the court in the assessment of damages under the Fatal Accidents Act in the following terms:

“The court must find out as a fact what the annual loss of dependency is. In so doing, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fraction to be applied. Each case must depend on its facts. When a Court adopts any fraction that must be taken as its finding of fact in the particular case. The annual loss of dependency must be multiplied by a figure representing a reasonable number of years per case. In considering that reasonable figure, commonly known as the multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased’s age, his expectation of working years, the ages of the dependants and length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand of the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and, if wisely invested, good returns can be expected.”

9. The evidence produced before the trial court was that the deceased worked at Hygienic Butchery and was earning a salary of Kshs.7,000/= per month. **Felistas Karithe Titus (PW1)** who was the deceased’s

wife, produced a letter (**Exhibit 7**) written by the manager which stated that the deceased was employed as a chef and earned a gross pay of Kshs.7,000 per month. According to the proceedings this evidence was not challenged by the respondents in cross-examination. The evidence further remained uncontroverted as the defendants did not call any witnesses in defence. The trial court reasoned out the award in the following terms:

“I concur that as the breadwinner the deceased was utilizing 2/3 of his salary to maintain his family. The 1/3 was for his own personal expenses and whatever he was spending came from his salary which was 7,000/=. A realistic multiplier considering all the vicissitudes of life, nature of his work and his environment and age is in the region of 35 as his also not a specialized job. I am prepared to employ that as multiplier to get lost years as: 4,666 x 35 x 12 x 2/3.”

10. I accept the finding of the trial court on the monthly earning of the deceased at Kshs.7,000/= proven on a balance of probability. It was not disputed at the trial that the same was gross salary. The issue of deductions was not raised at all neither was it shown that the amount fell within the bracket of taxable income. I therefore reject the submission that the court ought to have made a provision for tax deductions.

11. It is however unclear to me why the trial court having made a finding of a gross monthly earning of Kshs.7,000/= reduced it by 1/3 to be Kshs.4,666/= and still applied a dependency ratio of 2/3. Having correctly explained that the deceased spent 1/3 of his salary on himself and 2/3 on his family, there was no reason to effect an initial deduction of 1/3 before applying a 2/3 ratio. Secondly, it is also not clear why the deceased who was aged 35 years would be expected to work another 35 years. Although the deceased was not in public service employment which has a statutory retirement age, it would be expected, taking into consideration that he worked as a chef in a butchery that he would retire well below 70 years thus making a multiplier of 35 erroneous. Taking into account the vicissitudes of life, I would reduce that to 30 years. Besides, the dependency of the family would be expected to reduce when the infant children attained majority age and went on to earn their own living.

12. Following the above, I would be justified to disturb the award to take into consideration the proven monthly earning of Kshs. 7000 and not Kshs.4,666 and reduce the expected number of years to 30. The award would therefore be:

<i>Special damages</i>	-	36,500
<i>Pain & suffering</i>	-	20,000
<i>Loss of expectation of life</i>	-	80,000
<i>Lost years (7000 x 12 x 25 x 2/3)</i>	-	1,680,000
Total	-	1,816,500
<i>Less damages under the</i>		
<i>Law Reform Act</i>	-	100,000
Net award	-	1,716,500

13. In the premises, the appeal succeeds to the extent that the award on lost years is enhanced. The appellants shall have half the costs of this appeal and costs as awarded in the lower court.

Judgment delivered, dated and signed in open court

this 24th day of October 2017

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Ms. Kinuthia for plaintiff

N/A for defendents