

Total ksh.80,000

No special damages were awarded for want of proof.

3. Aggrieved by the award, the appellants preferred this appeal.

They raised the following 6 grounds of appeal in its memorandum:

1. The learned magistrate erred in dismissing the claim for loss of dependency thereby awarding a paltry kshs.100,000/= for pain and suffering and kshs.70,000/= for loss of expectation of life.

2. The honourable magistrate erred in law and in fact for holding that dependency had not been proved yet one of the plaintiffs testified and produced immunization cards for the two children of the deceased.

3. The honourable magistrate erred in law and in fact for holding that merely because the plaintiff did not produce an appointment letter for the deceased in proof of this employment, that there was no proof of earnings.

4. The honourable magistrate erred in fact in holding that since the death certificate showed that the deceased was aged 35 years, whereas the plaint indicated otherwise, that dealt a blow to the claim, whereas the death certificate which bore the correct details could have been used to adopt the correct multiplier.

5. The honourable magistrate erred in law in failing to award anything for loss of dependency whereas the plaintiffs ought to have been awarded even if the deceased was not employed as he must have been earning an income.

6. That the honourable magistrate erred in fact in failing to take judicial notice that even if the deceased had no dependants, a 1/3 is normally employed as the dependency ratio.

4. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. At the time of writing this judgment, the only parties who had filed their submissions was the respondents. I have re-evaluated the case that was before the trial court. I have also considered the submissions filed before this court.

5. The above grounds can be summarised into 4 main grounds namely

i. Whether or not the learned trial magistrate erred in law and in fact in dismissing the appellants' claim for loss of dependency (grounds 1, 2, & 5)

ii. Whether or not the learned trial magistrate erred in law and in fact in dismissing the appellants claim for proof of earnings (ground 3)

iii. Whether or not the learned trial magistrate erred in law and in fact in his finding on multiplier to be adopted (ground 4)

iv. Whether or not the learned trial magistrate erred in law and in fact in failing to take judicial notice that even if the deceased had no dependants, a conventional 1/3 is normally employed as the dependency ratio (ground 6).

6. The first ground is whether or not the learned trial magistrate erred in law and in fact in dismissing the appellants claim for loss of dependency. The appellants failed to file their submissions. The respondent's submit that the appellants failed to demonstrate that the learned magistrate erred in fact and in law in dismissing the claim for loss of dependency. They failed to adduce sufficient evidence to prove the dependency of the 2nd appellant(wife to the deceased) and their 3 children.

7. The duty of the 1st appellate court is to re-evaluate the case or arguments made before the trial court. The 1st appellant (PW1), a brother to the deceased, was the only witness who testified. In his testimony, PW1 did not adduce evidence to show how the 1st appellant was dependant on the deceased. The 2nd appellant who is alleged to be the deceased's wife did not attend court nor tender evidence of their prove of marriage.

8. The three children that were alleged to be the deceased's children, the 1st appellant did not provide any birth certificates to confirm that the 3 children were of the deceased. The immunization cards were produced in court, they had conflicting information with respect to the names and details of the children and their parents names therein.

9. It was the duty of the appellants to ensure that all crucial witnesses testify and all proper evidence produced to prove dependency. It was not enough for the appellants to allege that the 2nd appellant (the deceased wife) could not testify as she was in Moyale.

10. After a careful evaluation of the evidence tendered before the trial court, I am convinced that the trial magistrate was justified in dismissing the appellant's claim for loss of dependency.

11. The second ground of appeal is whether or not the learned trial magistrate erred in law and in fact in dismissing the appellants' claim for want of proof of earnings. The respondent submits that the evidence adduced by the 1st appellant with respect to the deceased's earning was inconclusive and therefore was held by the trial magistrate that the appellants had failed to prove the earnings of the deceased. I have re-examined the evidence that was presented before the trial court. The appellant via their plaint, alleged that the deceased earned ksh.8,000/= per month. During the 1st appellant's oral testimony, he alleged that the figure was ksh.10,000/=. The pay slips which were produced by the 1st appellant were for the month of April 2006 whereas the deceased died in March 2006. This piece of evidence appears unreliable and hence cannot help the appellant's case.

12. The issue of loss of dependency is an issue of fact. It depends on the circumstances of each case. A litigant is required to prove the dependency and ratio to be applied. This position was reiterated further in the case of **Dainty –vs- Haji & another (2005) 1 EA 43** where the court of appeal held *inter alia* that: **“the extent to which the family is supported must depend on the circumstances of each case. To ascertain it, the judge will always analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation.”**

The trial magistrate therefore cannot be faulted in his finding under this head.

13. The third ground of appeal is Whether or not the learned trial magistrate erred in law and in fact in his findings on multiplier to be adopted. The respondent did not submit on this ground of appeal. The trial magistrate held (in dismissing the appellant's multiplier proposal) that: “the multiplier is a question of fact, and a party is bound by own pleadings.” The appellant via their plaint paragraph 7 stated that the deceased was 26 years old at the time of death while the deceased's death certificate in evidence shows the deceased died at the age of 35 years of age.

14. The appellants had the option of seeking to amend the plaint but they failed to do so even after the error became apparent. The right multiplier when adopted (with the evidence of proof of earning and dependants) is used in the calculation to arrive at the right figure by courts under the head of loss of earning and loss of dependency under the Fatal Accidents Act. Since all were not proved, then this award cannot stand. The learned trial magistrate finding on multiplier cannot therefore be disturbed.

15. The fourth ground of the appeal is Whether or not the learned trial magistrate erred in law and in fact in failing to take judicial notice that even if the deceased had no dependants, a conventional 1/3 is normally employed as the dependency ratio. The respondent submits that there was insufficient evidence with respect to who the deceased's dependants were and the extent to which they were dependent on the

deceased. It follows that the appellants did not prove that the deceased had any dependant to enable the court go ahead to apportion the dependency ratio.

16. The 1st appellant testified that the deceased was married and had a wife who is the 2nd appellant who had 3 children with the deceased. The appellant had picked a ratio of 2/3 as the dependency ratio without justifying proof of marriage, proof of paternity of the children and proof of earnings. Furthermore, there was no proof or any attempt to prove how much the deceased used to support his dependants when alive. As was held in **Anne Njoki Njenga –vs- Umoja Floor Mills and Another Nakuru HCC No. 149 of 2003**, where Musinga Judge, dismissed the plaintiff’s claim for dependency and stated *inter alia* that “dependency is a question of fact, which must be proved strictly.”

17. It was further held in **Mugo –vs- Ngari HCCC No. 5087 of 1990** that “It is trite law that a litigant has to prove the dependency ratio to the applied.”

18. In light of the foregoing, I am convinced that the trial magistrate was well guided by law and facts in dismissing the appellant’s claim for dependency ratio.

19. In the end, the appeal herein is found to be without merit and it is hereby dismissed. Each party to bear its own costs.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent