



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 91 OF 2013

1. **JAMES MWANGI NJOROGE..... 1ST**
APPELLANT
2. **STEPHEN KARIEGA.....2ND**
APPELLANT

VERSUS

MARGARET MUTHONI MUIKIA

(suing as Legal Representative of the estate for late **JOB OKELLO**)**RESPONDENT**

(Being an Appeal under Section 65 1(b) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 42 Rule 1 of the Civil Procedure Rules 2010 from the judgment and decree of the Honourable S. Mungai Principal Magistrate, delivered on 29th May 2013 at Nakuru Law Courts in CMCC No. 896 of 2011)

JUDGMENT

1. This appeal is against an award of **Kshs.3,600,000/=** to the Respondent being damages under the **Fatal Accidents Act**. The main ground of the appeal as summarised from the seven itemised grounds is that the said award was based on no evidence and/or insufficient evidence.

On the 28th March 2013, by a recorded consent order, parties to the suit apportioned liability at the ratio 85:15 in favour of the Respondent and against the appellants.

2. Briefly, the deceased one **JOB OKELLO** was lawfully travelling in motor vehicle registration **No. KAR 015R** along the Nakuru-Nairobi highway when the said vehicle was involved in an accident with motor vehicle Registration **No. KAW 481V** whereof he sustained fatal injuries. The Respondent obtained Letters of Administration of his estate and sued the appellants who were the owners and driver of motor vehicle Registration **No. KAW 481V**, the vehicle he was travelling in.

In her statement of claim, the Respondent stated that the deceased who was her husband was thirty-seven years old when he met his death and was a businessman making Kshs.200,000/= per month. While assessing damages for loss of dependency under the **Fatal Accidents Act** the trial Magistrate adopted an income of Kshs.25,000/= and a dependency ration of 2/3 and a multiplier of 18 years. That is what resulted to the Kshs.3,600,000/=. Together with the above, the trial court awarded Kshs.20,000/= fro pain and suffering and Kshs.120,000/= damages for loss of expectation of life both under the **Law Reform Act** which sum was reduced from the award under **Fatal Accidents Act** leaving a sum of

Kshs.3,600,000/= the subject of the appeal.

3. The Appellants case is that the trial court's adoption of multiplier of 18 years (but stated as 20 years) was on the higher side, and there was no proof of the deceased income of Kshs.25,000/= per month. It is their proposition that this court do reduce the deceased earnings to Kshs.10,000/= per month and reduce the multiplier to 12 years. It is also the appellants contention that the sum of Kshs.120,000/= damages awarded for loss of expectation of life was excessive. The appellants sought guidance from the case **Florence Karutha Malusi -vs- Transami (Kenya) Ltd(2004) KLR** where the deceased was aged thirty-seven years and a multiplier of twelve years was adopted in March 2004.

4. In response to the above submissions, the Respondent stated in her written submissions that the trial courts awards were reasonable and in tandem with comparable authorities, among them **Betsy Chebet -vs- Premier Diary Ltd HCCC No. 88 of 2003 and Jacinta Mbithi Wambua -vs- John Karitu Mabaraga Nairobi HCCC No. 640 of 2003 were similar awards under the Law Reform Act** were awarded.

5. This court is the first appellate court. It is mandated to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions – as stated in **Selle -vs- Associated Motorboat Company Ltd (1968) 123**. This court will also be very slow to interfere with the trial courts discretion in its assessment of damages unless it is shown that the court considered wrong principles or factors or failed to consider relevant factor, or that the award is so inordinately high or low that it must be a wholly erroneous estimate.

These principles were pronounced in the case **Kemfro Africa Ltd t/a Meru Express service – vs- Lubia & Another (1985) KLR**.

6. I have considered the trial court's judgment. In arriving at the ratios under the **Fatal Accidents Act**, the trial court considered the deceased's nature of business, the audited accounts, balance sheets for the years 2008 and 2009 where on average the deceased's income was shown to be slightly over Kshs.26,000/= monthly.

He applied Kshs.25,000/= that he deemed realistic. The deceased was an estate rent collection agent with twenty years experience. The appellant submits that the trial court erred in awarding the sum of Kshs.25,000/= monthly as income and that the plaintiff did not prove any income; and the court ought to have applied an income of Kshs.5,000/= per month being the Government Basic Wages.

As stated above, the sum of Kshs.25,000/= was based on an average earnings from the audited accounts. The appellant did not fault the audited accounts produced at the trial court. Indeed the appellants never questioned the authenticity of the said audited accounts. Other than stating on appeal that the income was not proved, the appellants have failed to show how the trial court considered wrong principles or factors or failed to consider any relevant factors in arriving at the said sum as stated in **Kemfro Africa Ltd (Supra)**. I find the trial courts justification in adopting Kshs.25,000/= as income very well reasoned and I have no reasons to interfere with the courts discretion that point.

7. The deceased was thirty-seven years old when he met his death. He had Dependants. The plaintiff was the widow, and between them were two children and expecting a third child. This was not in dispute. I did not reason to fault the 2/3 multiplicand adopted by the trial court.

Dependants under the **Fatal Accidents Act, Section 4(1)** is defined as follows:

“----- every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was caused---”

The widow and the children therefore fit well in the above description.

The widow testified that the deceased used to give her Kshs.500/= per day which financial

assistance is forever lost hence the loss of dependency to the dependents.

8. The appellants submitted that the multiplier of eighteen years adopted by the trial court was high and the said court failed to consider vicissitudes of life and proposed fifteen years as reasonable. While adopting the eighteen years multiplier, I am satisfied that the court considered the nature and risks on the deceased work that he held was not risky and did not expose him to a dangerous environment. At thirty-seven years old, the deceased would have worked upto the official retirement age of sixty years old, the deceased would have worked upto the official retirement age of sixty years and since he was in the private sector, would have continued past the sixty years capping. The court is minded of the unknown future, but all things being equal, the deceased would have lived a healthy working life upto about seventy years.

He had twenty-three years left to get to sixty years; and thirty-three years to get to seventy years. In adopting a multiplier of eighteen years, the court considered all the above factors and in my view arrived at a very reasonable multiplier. I shall not disturb the same.

9. I have considered the authorities tendered by the parties. They support by findings.

In **Mwanzia -vs- Ngalali Mutua Kenya Bus Ltd** and quoted in **Albert Odawa -vs- Gichumu Githenji NKU HCCA No.15 of 2003 (2007)**, the KLR, the court expressed its view that:

“-----the multiplier approach is just a method of assessing damages.It is not a a principle of law or a dogma.It can and must be abandoned where the facts do not facilitate its application.It is a practical method where factors as age of the deceased, amount of income and expected length of dependency are known---”

I am convinced that the trial court adopted the multiplier approach to arrive at the 18 year multiplier which as I have stated is reasonable. In the case **Florence Karutha Malusi -vs- Transami (Kenya Ltd (2004) KLR**, the deceased was thirty-seven years, and was a Government employee. The court adopted a multiplier of twelve years in 2004. At that time, the retirement age of Government employees was sixty years. The dependency ration adopted was two-thirds. This is in tandem with a multiplier of eighteen years today in the changed retirement age of sixty years.

As stated in the **Kemfro Africa Case (Supra)**, the appellant has not persuaded this court enough to interfere with the trial courts discretion. I hold that the multiplier of 18 years was neither too high nor unreasonable as to call for disturbance.

10. It is also the court's finding that damages awarded under the **Law Reform Act** of Kshs.120,000/= and which were deducted from the damages under the **Fatal Accidents Act** not high as for this court to interfere with the same. In majority of more recent court decisions, the awards for loss of expectations of life, depending on the age of the deceased, have been between Kshs.100,000/= to Kshs.200,000/=. See **High Court Civil Appeal(Machakos) No.108 of 2008 – Philip Musyoka Mutua -vs- Veronica Mbuto Mutiso, HCCC No. 1227 of 1998 Beatrice Wanjiku Mundia -vs- Themba Ngombe Ltd (1999) KLR and HCCC NO.303 of 2011 MNM and Another -vs- Solomon Karanja Githinji (2015) KLR.**

11. In conclusion the court finds no plausible grounds upon which it can set aside, vary or upset the trial courts judgment.

The appeal is dismissed with costs.

Dated, signed and delivered in open court this 28th day of January 2016.

JANET MULWA

JUDGE