



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO.3 OF 2011**

**WYCLIFFE JUSTUS AMALELE suing as a dependant and or**

**Personal rep of the estate of**

**VARRINE PHELASIA AMALELE.....APPELLANT**

**AND**

**IMA HAULIERS LTD.....1<sup>ST</sup> RESPONDENT**

**ISMAEL NANGA KANYAMU .....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgment of Hon. H. Wandere, SRM in Mumias PM.CC No.260 of 2008 delivered on 10/12/2010)**

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

**Introduction**

1. The appellant was the plaintiff in Mumias PMCC No.260 of 2008 in which he sued the respondents claiming damages under the Fatal Accident Act, Cap 32 Laws of Kenya and also under the Law Reform Act, Cap 26 Laws of Kenya. The appellant also claimed special damages, costs and interest being compensation for the loss and damage suffered by the estate of the deceased Varrine Phelesia Amalele following a road traffic accident which occurred on 01/02/2007 along the Mumias – Musanda road at Mumias Township. The deceased was a pedestrian.

2. During the proceedings in the Lower Court, liability was agreed at 70%:30% in favour of the appellant. After hearing evidence on quantum, the learned trial Magistrate assessed damages as follows:-

a. Pain and suffering	-	10,000.00
b. Loss of Expectation of life	-	70,000.00
c. Loss of dependency	-	96,000.00
d. Funeral expenses	-	15,000.00

**The Appeal**

3. Being dissatisfied with the award for being “too low”, the appellant brought this appeal premised on the following grounds:

1. That the learned trial Magistrate erred in law and fact in failing to make an award for loss of

dependency when the said loss or loss of earnings to the estate and or dependants of the deceased was proved to the standard required in law.

2. That the learned trial Magistrate erred in law and fact in holding that the deceased had no income when there was evidence that the deceased was a tailor, business woman and farmer and she alternatively ought to have applied the government minimum wage.

3. That the awards for the loss of expectation of life and pain and suffering were very much on the lower side and unreasonably low in view of comparable awards and were indefensible, unfair and resulted in a miscarriage of justice.

REASONS WHEREFORE, the appellant prays for orders:-

- a. That this appeal be allowed with costs.
- b. That a reasonable award for loss of dependency be made and the awards for loss of expectation of life and pain and suffering be increased and or revised upwards.

### **Duty of this Court**

4. As this is a first appeal, this Court is under a duty to carefully reconsider and evaluate the whole of the evidence with a view to reaching its own decision in the matter, only bearing in mind and making allowance for the fact that it does not have the privilege enjoyed by the learned trial Magistrate of seeing and hearing the witnesses. For this proposition see **Peters –vs- Sunday Post Ltd [1958] EA 424** and **Selle –vs- Associated Motor Boat Co. Ltd [1968] E.A 123.**

5. It is the above guiding principle that will assist this Court when reconsidering and evaluating the evidence afresh. This Court is also aware of the duty cast upon it of carefully considering the judgment of the learned trial Magistrate. In this regard it is worth remembering that it is a big thing for an appellate Court to interfere with the findings of a trial Court unless it is clear to the appellate Court that the findings are not supported by the evidence or that the learned trial magistrate applied the wrong principles especially in the assessment of damages.

### **The Appellant's Case**

6. As the only issue in dispute before the trial Court was assessment of damages the appellant who testified as PW1 told the Court that at the time of her death, the deceased had five (5) children although he gave the names of only four (4) of them, the youngest of whom was born on 15/12/2005. It was also stated that the deceased was a tailor and a business woman selling maize and beans in the market and that she was also a farmer. The deceased had a bank account at Cooperative Bank, Mumias branch held jointly with the appellant. The appellant stated that the deceased was feeding the children and taking care of them. The appellant also stated that after the death of the deceased there was no one to look after the children. According to the evidence, the deceased was a young lady aged 34 years old.

7. During cross examination, the appellant stated that the deceased died on the spot. The appellant was unable to produce receipts for the coffin, the 2 cows and transport. He also testified that though he was not dependant on the deceased, she used to assist him while she was alive.

### **The Respondent's Case**

8. The respondent did not call any witness after consent on liability was recorded.

### **Submissions**

9. In his written submissions filed on 26/10/2010, Counsel for the appellant proposed the following awards:-

- a. Loss of expectation of life - Kshs.120,000.00
- b. Pain and suffering - Kshs. 50,000.00
- c. Loss of dependency - Kshs.834,200.00
- d. Funeral expenses - Kshs. 20,000.00
- e. Police abstract - Kshs. 200.00
- f. Death Certificate - Kshs. 150.00
- g. Legal fees (succession proceedings)- Kshs. 20,000.00
- h. Medical expenses - kshs. 5,000.00

10. In computing loss of dependency a multiplier of 20 years was applied in addition to the presumption that the deceased used to apply 2/3 of her income on her family. The sum of kshs.5195/= was applied as deceased's salary. Reliance was also placed on two authorities, namely **Nrb HCC No.2750 of 1998 – Rebecca Saveth Mwangi –vs- Eastern Bus Ltd & another**. In that case, the deceased was 36 years old and earned a formal salary of kshs.10620/=. The trial Court used a multiplier of 19 years and a multiplicand of kshs.10620/= less the 1/3 share which deceased was spending on himself thus bringing the award under the Fatal Accidents Act to kshs.1,614,240/=. Damages awarded under the Law Reform Act was kshs.100,000/- (conventional figure) while for pain and suffering kshs.50,000/= was awarded.

11. The second authority relied upon by the appellant was **Mombasa HCCC No.482 of 1993 – Mary Awino Adungo –vs- deceased** therein was 32 years old. He had 5 children aged between 14 and 1 year. The trial Court applied a multiplier of 23 years, after taking into account the vicissitudes of life and multiplicand of kshs.8000/=.

#### **Judgment of the learned trial Court in the instant case**

12. In the judgment, the learned trial Magistrate concluded that since the deceased had no known income, a sum of kshs.96000/= was sufficient for loss of dependency. No workings to support the figure were shown.

#### **The Law**

13. The law provides that an appellate Court will not usually interfere with an award of damages (the same being discretionary) unless it is clear that in arriving at the figure, the Court applied the wrong principles.

#### **Analysis and Findings**

14. In the present case, the appellant told the Court that the deceased was a tailor and a business person and that she had a joint account with the appellant at Cooperative Bank in Mumias though no bank statements were produced I have no doubt in my mind that the deceased used to earn some money and a figure of kshs.5195/= per month in accordance with the Regulation of Wages and Conditions of Employment Act, General (amendment) Order 2006 under Legal Notice No.38 of 2006 would not have been unreasonable. I shall therefore take that figure as the multiplicand.

15. Regarding the multiplier the learned trial Magistrate said nothing about it. Taking into account the authorities cited above and considering that the deceased was 34 years old with no signs of ill-health, I am satisfied that a multiplier of 26 years would be sufficient. Accordingly and presuming that the deceased used to apply 2/3 of her earnings on her family, loss of dependency would be as follows:

$$\text{Kshs.5195} \times \frac{2}{3} \times 12 \times 26 = 1080560$$

$$\text{Less 30\%} \qquad \qquad \qquad = \underline{324168}$$

$$\text{Kshs.}\underline{756,392}$$

16. I will also interfere with the other awards as the reasons given by the learned trial Magistrate are not

convincing. Accordingly I will set aside the judgment of the learned trial magistrate on quantum and substitute the same with the following:

a. Loss of expectation of life	-	Kshs.100,000.00
b. Pain and suffering	-	Kshs. 50,000.00
c. Loss of dependency	-	Kshs. <u>756,392.00</u>
		<u>Ksh. 906,392.00</u>
Less under Fatal Accident Act		<u>Kshs.100,000.00</u>
Net		Kshs. <u>806,392.00</u>

Specials

a. Funeral expenses		Kshs.20,000.00
b. Police abstract		Kshs. 200.00
c. Death Certificate		Kshs. 150.00
d. Legal Fees		Kshs. <u>20,000.00</u>
	Less 30%	Kshs.40,350.00

12,105.00

Kshs228,245.00

Total award = Kshs.834637.00

17. The appellant shall have costs of the suit in the Lower Court as well as costs of this appeal plus interest.

18. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 17th day of March 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Akwala (present) for Appellant

Miss Wilunda (present) for Respondent

Mr. Lagat - Court Assistant