



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 119 OF 2008**

**JEREMIAH NJUGUNA.....1ST APPELLANT**

**P.N MASHRU LIMITED.....2<sup>ND</sup> APPELLANT**

**VS.**

**ANAGLETA J. YATOR & EDEL J. BIWOTT(*Suing as the administratrix of the***

***estate of the late* PAUL K. KIPLAGAT.....RESPONDENT**

***(An Appeal from the Judgment and Decree of the Senior Principal Magistrate Honourable***

***W. N. Njage (SPM), in Eldoret CMCC No. 951 of 2006 dated 2. 10. 2008).***

**JUDGMENT**

1. This appeal arises from the judgment and decree of the lower court in Eldoret CMCC No. 952 of 2006 in which the respondents were the plaintiffs while the appellants were the defendants.
2. The respondents had sued the appellants in their capacity as the legal representatives of the Estate of one *Paul Kipruto Kiplagat* who lost his life in a fatal road traffic accident. In their plaint dated 8<sup>th</sup> November, 2006, they sought for special and general damages on their own behalf and on behalf of the deceased's dependants under the *Law Reform Act* and the *Fatal Accidents Act*. They also prayed for costs of the suit and interest.
3. It was the respondent's case that on or about 23<sup>rd</sup> January, 2004 the 1<sup>st</sup> defendant negligently drove, managed or controlled motor vehicle registration number KAM 501L Scania Lorry which was owned by the 2<sup>nd</sup> appellant and that he caused it to violently collide with motor vehicle registration Number. KZG 321 Peugeot Pick up as a result of which *Paul Kipruto Kiplagat* sustained fatal injuries.
4. In their joint statement of defence dated 7<sup>th</sup> December, 2006, the appellants denied liability *in toto* and put the respondents to strict proof thereof. They urged the trial court to dismiss the suit with costs.
5. After full trial, the learned trial magistrate entered judgment on liability against the appellants in favour of the respondents jointly and severally at 100%. She also awarded the respondents special and general

damages in the total sum of Kshs.1,024,030 together with costs of the suit and interest at court rates.

6. The appellants were aggrieved by the decision of the trial court. They proffered the instant appeal vide a memorandum of appeal dated 5<sup>th</sup> November, 2008 relying on five grounds of appeal as listed hereunder;

*i. The learned trial magistrate erred by arriving at a finding on liability, which was not supported by evidence.*

*ii. The learned trial magistrate erred in law and fact in basing his finding on irrelevant matters.*

*iii. The respondent's case was not proved on balance of probability as is required by law.*

*iv. The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered by the plaintiff.*

*v. The learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.*

7. From the above grounds, it is clear that the appellants appeal challenges the trial court's decision on both liability and quantum of damages. Parties agreed to have the appeal prosecuted by way of written submissions. The appellants filed their written submissions on 5<sup>th</sup> June, 2014 while those of the Respondents were filed on 18<sup>th</sup> March, 2014.

8. This being a first appeal to the High Court, it is an appeal on both the facts and the law. As the first appellant court, I am enjoined to revisit the evidence presented to the trial court and re-evaluate it with a view to arriving at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witness and give due allowance for that disadvantage. See: *Sumaria & Another Vs Allied Industrial Limited (2007) 2 KLR 1; Selle & Another V Associated Motor Boat Company Limited & others (1968) EA 123.*

9. I have carefully considered the evidence presented before the trial court, the rival submissions made by the parties and all the authorities cited by both parties.

On the appeal on liability, PW2 testified that on 23<sup>rd</sup> January, 2004 at around 7.30-8p.m he was driving motor vehicle registration number KZD 321 along Eldoret Nyaru Road. He was conveying a few passengers who included the late *Paul Kipruto*. He recalled that when he was preparing to turn right and had already switched on his right indicators, a scania trailer registration Number KAM 501 rammed into his motor vehicle from behind.

According to PW2, the lorry driver had been over speeding and its driver was to blame for the accident. This evidence was fully supported by the evidence of PW3 who confirmed that the driver of the scania lorry who is the 1<sup>st</sup> appellant herein was blamed for the accident and was charged with the offence of causing death by dangerous driving contrary to **Section 46** of the **Traffic Act**.

10. The appellants did not adduce any evidence to discount the respondent's case regarding the manner in which the accident occurred.

When entering judgment on liability, the trial court stated as follows:-

***"I do not hold that the 1<sup>st</sup> defendant was wholly to blame for the accident and the death of the deceased, the plaintiff factually proved all the particulars of negligence placed against the defendant in paragraph 5 (1) to (14) of the plaint. I do hold that the driver of motor vehicle registration No. KZG 321 L did not in any way cause or contribute to the accident. The defendant did not tender any evidence to either explained causation or dispel negligence of the***

**accident or challenge the evidence adduced by PW2 and PW3. The plaintiff's case therefore remain unchallenged and uncontroverted. I therefore so hold the 1<sup>st</sup> defendant 100% liable for the accident. The 2<sup>nd</sup> defendant is the owner of motor vehicle registration No. KAM 501 L. The 1<sup>st</sup> defendant was his driver and servant at the time of the accident. I do hold the 2<sup>nd</sup> defendant vicariously liable to the plaintiff's on the negligence of the 1<sup>st</sup> defendant. I do therefore enter judgment for the plaintiff's against the defendants on negligence, jointly and severally on liability at 100%".**

11. Given the evidence adduced by PW2 and PW3 which was not controverted as the appellants did not offer any evidence to the contrary during the trial, I am unable to fault the decision of the learned trial magistrate on liability.

It is trite that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles. See: Sumaria & Another V Allied Industrial limited (Supra); Peters V Sunday Post (1958) EA 424 and Jabane V Olenja (1986) KLR 661. I am satisfied that the decision was based on the evidence that was before the trial court and was based on sound legal principles. I therefore find no reason to disturb the learned trial court's finding on liability and the same is hereby upheld.

12. On quantum, the trial court categorized the damages awarded to the respondents as follows;

- a. Pain and suffering – Kshs. 20,000/-
- b. Loss of expectation of life – Kshs. 100,000/-
- c. Loss of dependency – Kshs. 800,000/-
- d. Special damages – Kshs. 34,030/-
- e. Loss of consortium – Kshs.50,000/-
- f. Funeral expenses – Kshs. 20,000/-

13. In their submissions, the appellants correctly submitted that under *section 2 of the Law Reform Act*, a deceased persons Estate is entitled to damages under the following heads;

1. Funeral expenses
2. Pain and suffering
3. Loss of expectation of life

The appellants also submitted that the trial magistrate erred in awarding the respondents damages under both the *Law Reform Act* and under the *Fatal Accidents Act* as this amounted to double compensation.

14. In their view, the respondents should have been awarded general damages under the *Law Reform Act* as follows;-

- a. Pain and suffering 10,000/- as the deceased allegedly died instantly.
- b. Kshs. 70,000 for loss of expectation of life.
- c. Kshs. 5,000 for funeral expenses since no receipts were produced to prove the sum claimed of Kshs.60,000/-.

15. Under the Fatal Accidents Act, the appellants proposed that the loss of dependency be calculated using a multiplicand of Kshs.4,500; a multiplicand of 13 years and a dependency ratio of 2/3. The proposed amount for loss of dependency was therefore Kshs. 468,000/-.

16. On their part, the respondents did not respond to the issues raised by the appellants on quantum. The respondents counsel simply cited three authorities to guide the court in assessing damages for loss of dependency and loss of consortium.

17. The principles that guide an appellate court in deciding whether or not to interfere with an award of damages by a trial court has been restated in many authorities. In *Mariga V Musila (1984) KLR 251* the Court of Appeal while addressing its mind to this question held as follows;

***“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..”***

In *Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another (1987) KLR 30* the same court expressed itself as follows;

***“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 to be that; it must be satisfied that either 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...”***

Guided by the above principles, I now turn to determine whether the trial magistrate erred in any way when assessing the damages that she awarded to the respondents.

18. I wish to start by addressing the submission made by the appellant that the trial magistrate ought not to have awarded damages under both the *Law Reform Act* and the *Fatal Accidents Act* as this amounted to double compensation. It is important to note that damages under the *Law Reform Act* are awarded for the benefit of the Estate of a deceased person while those under the *Fatal Accidents Act* are awarded to the deceased’s dependants to compensate them for loss of their dependency.

19. The general damages awarded under the two legal regimes are therefore meant for different purposes but since in reality it happens that some administrators of Estates double up as heirs to the deceased, the courts have over time developed a practice of awarding only conventional sums under the *Law Reform Act* in order to avoid overcompensating the dependants for their loss.

20. Having said that, I find that the learned trial magistrate did not err in awarding general damages under both the *Law Reform Act* and the *Fatal Accidents Act*. The respondents were entitled to seek and obtain damages under the two statutes since this is allowed by the law. *Section 2(5)* of the *Law Reform Act* clearly provides that the right conferred by or for the benefit of the Estate of a deceased person shall be *in addition to* and *not in derogation* of the rights conferred on the dependants of a deceased person under the *Fatal Accidents Act*. The trial court was therefore correct in awarding general damages under the two statutes.

21. I now wish to examine whether the trial court erred in the assessment of general damages awarded to the respondents given the evidence on record. I will start with the damages awarded under the *Law Reform Act*. Under the head of pain and suffering, the respondents were awarded Kshs.20,000/-. In their submissions, the appellants claimed that the deceased died instantly and that a sum of Kshs.10,000 was sufficient compensation for pain and suffering. The evidence on record shows that the deceased succumbed to his injuries on 26<sup>th</sup> January, 2004 while undergoing treatment. This fact was not challenged by the appellant during the trial. I therefore find that the deceased did not die instantly but

died three days after the accident.

General damages under this head are usually determined depending on the length of time the deceased endured pain and suffering before death. The deceased must have suffered a lot of pain for three days and in my view, an award of Kshs.20,000 was quite low given the length of time the deceased suffered before he succumbed to his injuries but since I cannot substitute my discretion with that of the trial court, I will not disturb that award. The same is accordingly upheld.

22. With regard to damages for loss of expectation of life, the appellants have conceded that the deceased was 27 years old at the time of his death. They have proposed a sum of Kshs.70,000/-. The trial magistrate awarded general damages in the sum of Kshs. 100,000 under this head.

Given the age of the deceased at the time of his death, I am not persuaded that the sum of Kshs.100,000 was inordinately high as to be unreasonable or as to attract an inference that it must have been an erroneous estimate of the loss occasioned to the Estate due to the curtailment of the deceased's life in the accident in question. I therefore find no good reason to interfere with the award and the same is hereby upheld.

23. The other claim made by the respondents under the *Law Reform Act* was with respect to funeral expenses. The appellants claim that even though the respondents did not produce any receipts to prove their claim of Kshs.60,000, a modest sum of Kshs.5,000 would have been sufficient in the circumstances. In her evidence before the trial court, PW1 testified that though she did not have receipts to prove the expenses incurred by the Estate in organizing for the deceased's funeral, the Estate paid for the coffin, met transportation costs and bought food for the mourners including a cow which was slaughtered.

The trial magistrate awarded the respondents Kshs.20,000 as funeral expenses which in my opinion was quite reasonable given the evidence adduced in support of the claim. The award is therefore upheld.

24. Turning to the award for loss of dependency, there is evidence that the deceased used to be a matatu driver. According to PW1 who was his widow, the deceased used to earn a monthly salary of Kshs.9,000/-. They were blessed with three children. He was their sole breadwinner and he used to give PW1 Kshs.5,000 monthly for their upkeep. In their submissions, the appellants claim that dependency was not proved since PW1 did not produce birth certificates to prove that her union with the deceased was blessed with three children. They also disputed the claim that he earned a monthly salary of Kshs. 9,000 and proposed instead that the multiplicand be based on the minimum wage of Kshs.4,500. They also suggested a multiplier of 13 years and a dependency ratio of 2/3.

25. In her judgment, the trial magistrate appreciated that no documentary evidence had been produced to prove that the deceased used to earn a salary of Kshs.9,000/-. She adopted a multiplicand of KShs.5,000 which in her view would be a reasonable salary for a matatu driver in year 2004, a multiplier of 20 years and a dependency ratio of 2/3.

26. It is not disputed that the deceased was 27 years old at the time of her death and that he used to be a matatu driver. This was not an occupation that was subject to the normal mandatory retirement age of 60 years. Given long life, it is possible for a matatu driver to work for well over 50 or 60 years. This means that the deceased but for the accident may have worked for over 25 years but the trial magistrate in her discretion having taken into account the vicissitudes of life used a multiplier of 20 years. If it was up to me I would have used a higher multiplier given the age at which the deceased lost his life. However, I cannot disturb the decision of the trial court just because in my opinion a higher multiplier was more appropriate in this case. I will thus uphold the multiplier adopted by the learned trial magistrate.

The fact that there was no evidence to prove that the deceased had three children is now immaterial given that the appellant has conceded to the use of a dependency ratio of 2/3. The multiplicand proposed by the appellants is not far off from the one that was used by the trial court. I am unable to fault the learned trial magistrate on the award of loss of dependency. I cannot say that she took into account irrelevant factors or that she applied the wrong legal principles. I accordingly uphold the award.

27. Regarding damages for loss of consortium, this award does not appear to have been specifically challenged by the appellant but in my view, the damages under this head were erroneously awarded. I have read the persuasive authority relied on by the respondent to support the award under this head, that is, *Ruth Chepngeno Mutai V Patrick Wafero Oloo & Another (Kericho) HC NO. 85 of 2000* and with respect, I have noted that Visram J in that case (as he then was) did not lay any legal basis for an award of Kshs.100,000 for loss of consortium.

In my view, there is no law that provides for an award of damages to the spouse of a deceased person for loss of consortium. *The Law Reform Act* and the *Fatal Accidents Act* are to my mind the only statutes that govern the award of general damages in fatal accident claims. Those statutes only recognize the award of damages under three heads and loss of consortium is not one of them. These are damages for pain and suffering, loss of expectation of life and loss of dependency as well as sums for reimbursement of funeral expenses. As I stated in *Innocent Keti Makaya Denge V Peter Kipkore Cheserek & Another Civil Appeal No 96 of 2013*, a claim for loss of consortium can only be incorporated within a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that due to the injuries sustained, the claimant was incapable of enjoying consortium with his or her spouse and that therefore, his or her quality of life has as a result been diminished. It is therefore my finding that the award of loss of consortium by the learned trial magistrate in this case was made contrary to the applicable law and the same is hereby set aside.

28. Lastly on the award of special damages, the trial magistrate awarded a sum of Kshs.34,030 which was pleaded and proved. The said sum was not challenged on appeal and the same is hereby upheld.

29. In the end, this appeal partially succeeds to the extent that the award of damages for loss of consortium has been set aside. The other awards remain undisturbed. Consequently, I set aside the judgment of the lower court and substitute it with a judgment for the respondents against the appellants jointly and severally in the total sum of Kshs. 974,030.

The amount will attract interest at court rates from today's date until full payment. The appellants shall bear the respondents costs in the lower court but each party shall bear its or his own costs in respect of the appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 19<sup>th</sup> day of April, 2016.**

In the presence of:-

Ms Kipyego holding brief for Mr. Kibichiy for the appellants

Ms Naomi Chonde Court Clerk

No appearance for the Respondents.