



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 73 OF 2009**

**PHILIP KIPLIMO TUWEI.....APPELLANT**

**VERSUS**

**ELKANA KIPSEREM NGETICH (Suing as legal Administrator of the estate of**

**ESTHER JEPTOO (deceased).....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Principle Magistrate Honourable J. M NJOROGE (PM), in KAPSABET PMCC No. 127 of 2008, dated 12<sup>th</sup> May, 2009)***

**JUDGMENT**

1. The appellant was the defendant in Kapsabet PMCC No. 127 of 2008. He had been sued by the respondent in his capacity as the administrator of the Estate of the late *Esther Jeptoo* who lost her life as a result of injuries sustained in a fatal road accident. In the suit, the respondent sought both general and special damages under both the Law Reform Act and the Fatal Accidents Act. He also prayed for costs of the suit and interest.
2. In his plaint dated 29<sup>th</sup> July 2008, the respondent pleaded that on 29<sup>th</sup> May 2006, the deceased was being conveyed on a bicycle as a pillion passenger when the appellant negligently rode, managed and or controlled his motor cycle registration number KAM 774Z as a result of which it collided with the bicycle the deceased was riding on causing her fatal injuries.
3. The Appellant in his statement of defence dated 27<sup>th</sup> September, 2008 admitted the occurrence of the accident and ownership of motor cycle registration number KAM 774Z. He also admitted that the deceased was a pillion passenger on the bicycle which was involved in the accident. The appellant however denied that he caused the accident by negligently driving or controlling his motor cycle as alleged. He averred that the accident was caused by the pedal cyclist and the deceased. The particulars of their alleged negligence were set out in the defence.
4. The record shows that on 7<sup>th</sup> April 2009, the parties recorded a consent just before they closed their respective cases. One of the terms of the consent was that Eastern Produce Company Ltd be joined in the suit as the second defendant and that the statement of defence be amended to read that the appellant was only in charge of the motor cycle while the company to be joined as the 2<sup>nd</sup> defendant was its owner. The terms of the consent were however not implemented as the pleadings were not formally amended to incorporate the proposed changes. But at the end of the trial, the learned trial magistrate entered judgment on liability for the respondent against the appellant at 100% and final judgment against the defendants jointly and severally for the total sum of Kshs. 1,000,000 being general and special damages together with costs of the suit and interest.

5. The appellant was aggrieved by the trial court's decision on both liability and quantum of damages. In his memorandum of appeal filed on 11<sup>th</sup> June 2009, the appellant raised eight grounds of appeal which are reproduced hereunder;

**(i) The learned magistrate erred in law in holding the Appellant liable without any evidence in that regard.**

**(ii) The learned magistrate erred in law and in fact in holding that the Defendant did not appear to challenge the plaintiff's case yet from the proceedings it was agreed by consent of both counsel for the Appellant and Respondent that the Defendant's evidence in Kapsabet SRMCC No. 406 of 2006 was to apply in this case.**

**(iii) The learned magistrate erred in law and in fact in adopting Kshs.10,000/- as monthly income for the deceased when no proof of income was produced in evidence in the trial court during the hearing.**

**(iv) The learned magistrate erred in law and in fact in adopting a dependency ratio of 2/3 when there was no proof adduced in evidence that the dependants were actually dependants of the deceased and/or children of the deceased.**

**(v) The learned magistrate erred in law and in fact in adopting an unreasonable dependency ratio of 2/3 yet two of the alleged dependants were 28 years and 30 years old and the third dependant was 16 years old and it was not proved as to how they depended on the deceased.**

**(vi) The learned magistrate erred in law and in fact in awarding special damages which were never proved.**

**(vii) The learned magistrate erred in law and in fact in applying a multiplier of 10 years yet the deceased was aged 53 years at the time of her death.**

**(viii) The learned magistrate erred in law and in fact in failing to consider the evidence tendered in totality.**

6. The appeal was prosecuted by way of both written and oral submissions. The appellant filed his written submissions on 21<sup>st</sup> May 2014 while those of the respondent were filed on 17<sup>th</sup> June 2014. The submissions were highlighted before me on 5<sup>th</sup> July, 2016. Learned counsel *Mrs. Khayo* urged the appeal on behalf of the appellant while learned counsel *Mr. Omondi* represented the respondent.

7. As this is the first appeal, this court is called upon to analyse and re-assess the evidence placed before the trial court and arrive at its own independent conclusions bearing in mind that unlike the trial court, it did not have the advantage of seeing or hearing the witnesses testify.

8. It is important to state at this juncture the principles that guide an appellate court in determining appeals from the lower court. As a general rule, an appellate court should be slow to interfere with findings of fact made by the trial court. It should be cautious not to substitute its own findings with those of the trial court. An appellate court should reverse the lower court's findings only if it was demonstrated that they were based on no evidence or on a misrepresentation of the evidence or if it was satisfied that in making its decision, the trial court considered irrelevant or extraneous matters. The decision would also be reversed if it was anchored on wrong legal principles.

9. The Court of Appeal gave a very good summary of the mandate of an appellate court in ***Kiruga V Kiruga & Another (1988) KLR 348*** when it stated as follows;

***"...An appellate court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether***

***the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed...***

10. Guided by the above stated principles, I will now embark on the task of determining whether the learned trial magistrate erred in arriving at his decision on liability and quantum. I will first deal with the issue of liability. In order to determine this issue, it is necessary to set out the evidence that was placed before the trial court.

11. The respondent testified as PW1. He stated that on the material date at around 6 p.m, he was riding a bicycle on the left lane of the Nandi Hills – Kapsabet road proceeding towards Kapsabet. He was carrying the deceased, his late mother as a pillion passenger. This is when a motor cycle registration number KAM 774Z appeared from the opposite direction and in an attempt to overtake a motor vehicle which was being towed, the motor cycle veered off its lane and collided with PW1's bicycle. As a result of the accident, his mother sustained injuries which caused her death three days later.

12. There was also the evidence of the police officer who testified as PW3 in Kapsabet PMCC 406 of 2006 which pursuant to the consent recorded by the parties on 7<sup>th</sup> April, 2009 was adopted as part of the respondent's case. It was also agreed that the evidence of DW1 and DW2 in that case be adopted in support of the appellant's case.

The adopted evidence in PMCC 406 of 2006 was incorporated at page 31-33 of the consolidated record of appeal filed on 22<sup>nd</sup> January, 2015 with leave of the court.

13. The record shows that the police officer (PW3 in PMCC 406 of 2006) corroborated the respondent's claim that it was the appellant who carelessly caused the accident by veering off his proper lane and colliding head on with the respondent's bicycle when it was on its proper lane, that is, the left side as one faces Kapsabet direction.

14. On his part, the appellant testified that the respondent negligently caused the accident by encroaching on his lane with a bicycle which had no lights. His evidence was however contradicted by DW2 who was an eye witness to the accident. DW2 recalled that the collision occurred on the left side of the road which the bicycle was supposed to be using.

15. On my own evaluation of the evidence, I am unable to agree with the submission made by the appellant that the respondent did not prove his case on a balance of probabilities allegedly because he did not describe how the accident occurred and that he did not avail eye witnesses to the accident. It is clear from the evidence that the respondent clearly narrated how the accident occurred and his version of events was validated by the evidence of two independent witnesses who testified in Kapsabet PMCC 406 of 2006 concerning the same accident.

15. It is evident that the appellant failed to exercise due care and attention to other road users by attempting to overtake a motor vehicle when it was obviously unsafe to do so and by failing to properly manage or control the motor cycle with the result that he veered off the road and caused a collision in which the deceased sustained fatal injuries.

16. In making his finding on liability, the learned trial magistrate after specifying the acts of negligence which were committed by the appellant correctly noted that the appellant had failed to prove any contributory negligence on the part of the respondent or the deceased. Given the evidence on record, I am unable to fault the learned trial magistrate on his finding on liability and the same is hereby upheld.

17. On quantum, the learned trial magistrate itemized the damages awarded to the respondent as follows:-

(a) Loss of dependency Kshs.800,000.

(b) Loss of expectation of life Kshs. 100,000.

(c) Pain and suffering Kshs.70,000.

(d) Special damages Kshs.30,000.

Total Kshs. 1,000,000.

18. The thrust of the appellant's submissions on quantum was that the award of general damages awarded to the respondent was excessive as to justify the intervention of this court. The appellant further argued that dependency was not proved; that the trial court erred in adopting a dependency ratio of 2/3 and a multiplicand of Ksh. 10,000. The appellant also urged me to find that the trial court wrongly applied the law by awarding special damages which were pleaded but not strictly proved.

19. On behalf of the respondent, Learned Counsel *Mr. Omondi* urged me to find that there was no basis for disturbing the award of damages awarded to the respondent as in his view, they were reasonable. Counsel asserted that loss of dependency had been proved as it was not disputed that the deceased was survived by three children and that the application of the multiplicand of Ksh 10,000 was supported by the testimony of the respondent on the deceased's monthly earnings.

20. The respondent also justified the award of special damages in the sum of Kshs.30,000 for funeral expenses contending that funeral expenses were a unique kind of special damages which did not need to be strictly pleaded and proved. For this proposition, reliance was placed on the authorities of *Gaudencia Atieno Amino suing as an administrator and personal representative of Francis A. Okello V Akamba Public Road Services Ltd & 2 others Kisumu HCCCC No. 173 of 2001* and *Premier Dairy Limited V Amarjit Sagon and Another Kisumu HCCA No. 312 of 2009.*

21. The starting point in my view in embarking on a consideration of whether or not to disturb an award of damages made by a trial court is to appreciate that the award of damages is at the discretion of the trial court and that an appellate court's mandate to interfere with that discretion is limited to certain circumstances. In *Mariga V Musila (1984) KLR 251*, the Court of Appeal when restating the principles that ought to guide an appellate court on this matter stated 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..”.***

See also *Kemfro Africa Limited t/a Meru Express Services & Another V Lubia & Another (1987) KLR 30.*

22. Guided by the above principles, I now turn to determine whether the learned trial magistrate erred in assessing the damages awarded to the respondent.

I wish to start with the damages awarded under the Law Reform Act. Under the head of pain and suffering, the deceased's Estate was awarded Kshs.70,000 for pain and suffering. Damages under this head are normally assessed on the basis of the length of suffering the deceased endured before death.

23. The trial magistrate in awarding damages under this head reasoned that the deceased succumbed to her injuries three days after the accident and must have undergone a lot of suffering. The death certificate produced as Exhibit 1 confirms that the deceased died on 31<sup>st</sup> May, 2006 while undergoing treatment at the Moi Teaching and Referral Hospital. I agree with the learned trial magistrate that the deceased must have experienced immense pain and suffering for the three days she lived before her demise and an award of Kshs.70,000 to compensate her estate for her pain and suffering does not appear to me to have been unreasonable. I find no good reason to disturb it and the same is accordingly upheld.

24. Regarding damages for loss of expectation of life, the appellant has admitted that the deceased died at the age of 53 years. There is no evidence on record to suggest that she was in poor health. Her life was suddenly cut short by the injuries sustained in the accident. In the circumstances, I am not persuaded that the conventional sum of Ksh.100,000 awarded to her Estate under this head was unreasonable or inordinately high as to give rise to an inference that it was an erroneous estimate of the loss suffered by her Estate. The award is accordingly upheld.

25. With respect to the award of Kshs.30,000 as special damages for funeral expenses, I agree with the appellant's submissions that as a general rule, special damages must be specifically pleaded and proved. But with regard to a claim for funeral expenses which is provided for under Section 2(c) of the Law Reform Act, the courts have severally held that such a claim should not be defeated merely because no documentary evidence was produced to prove the actual sums expended during the funeral. See: **Kenya Power & Lighting Co. Ltd V Joseph Khaemba Njora [2005]eKLR; Gaudentia Atieno Amimo suing as the administrator and personal representative of Francis A. Okello V Akamba Road Services & 2 others (supra).**

26. In **Premier Diary Ltd V Amarjit Singh Sagoo & Another (supra)**, the Court of Appeal addressed this issue and expressed itself as follows;

***“We do not think that it is a breach of the general rule that special damages must be pleaded and proved to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved...”***

27. In view of the foregoing, I am persuaded to find that the trial court did not err when it awarded the modest sum of Kshs.30,000 as funeral expenses even though the respondent did not produce any receipts to substantiate his claim that it was the amount expended by the deceased's Estate in preparing her funeral. In the premises, I affirm the trial court's award of special damages in the sum of Ksh. 30,000.

28. Turning to the award for loss of dependency, the respondent testified that the deceased was a business lady earning a monthly income of Kshs.30,000. He did not disclose what kind of business the deceased was engaged in nor did he produce any evidence to support the claim regarding her alleged income. The trial magistrate did not accept the respondent's evidence. Instead, he made a finding that the deceased used to earn Kshs.10,000 monthly and used it as the multiplicand. The learned trial magistrate did not assign any reason for settling on this amount and did not lay any basis for that finding. The finding was not supported by any evidence. In the absence of evidence proving the nature of business the deceased was involved in and proof of her income, the learned trial magistrate ought to have been guided by the earnings of an unskilled worker as provided for in the *Regulation of wages (General Amendment) Order 2005* which was about Kshs.5,000 for persons working outside Nairobi, Mombasa and Kisumu. I am thus satisfied that the learned trial magistrate erred in applying a multiplicand which was not supported by any evidence. I thus set aside the multiplicand adopted by the trial court of Ksh. 10,000 and substitute it with a multiplicand of Kshs.5,000.

29. The second issue for determination under loss of dependency is the appellant's complaint that the trial court applied the wrong dependency ratio. I have considered the evidence adduced by the respondent and I am inclined to agree with the appellant's submissions on this point. In his evidence, the respondent reiterated what he pleaded in his plaint that the deceased was survived by three children namely *Daisy Chepchumba* and *Nancy Cherono* both aged 28 years and *James Kiprono* who was 16 years old. Dependency is a question of fact which must be established by evidence but in this case, no attempt was made to prove how *Daisy Chepchumba* and *Nancy Cherono* who were adults aged 28 years depended on the deceased for their livelihood. In any event, *Section 4* of the *Fatal Accidents Act* defines dependants to be a wife, husband, parent and child of the deceased. The *Blacks Law Dictionary Eighth Edition* at Page 254 defines a child as ***“a person under the age of majority”***. *Daisy* and *Nancy* were already adults by the time the deceased passed on. Whichever way one looks at it, there was absolutely no basis for the trial

court's finding that the deceased had three dependents for whom she was the sole breadwinner. It is my finding that the trial magistrate misdirected himself by applying a dependency ratio of 2/3 when the pleadings and the evidence established that the deceased had only one dependent who was a minor aged 16 years. The said ratio is consequently set aside and considering that the deceased must have spent a significant amount of her income taking care of the minor, i substitute it with a ratio of 1/2.

30. With regard to the multiplier applied by the trial court, I find nothing in the appellant's submissions that would lead me to disagree with the multiplier of 10 years used by the learned trial magistrate considering that the deceased was 53 years at the time of her death and she was not in formal employment. There was also no evidence to suggest that she was in poor health or that she was exposed to any life threatening circumstances. The multiplier of 10 years is accordingly confirmed.

31. In view of the foregoing, I shall calculate damages for loss of dependency as follows;

$Kshs.5,000 \times 10 \times 1/2 \times 12 = 300,000$ . The appeal consequently succeeds to this extent only.

32. In the end, I set aside the judgment of the trial court and substitute it with a judgment in favour of the respondent in the total sum of Kshs.500,000. The amount shall accrue interest at court rates from the date of judgment in the lower court until full payment.

33. The appellant shall bear the respondents costs in the lower court but as the appeal has partially succeeded to a limited extent, the appellant shall have one third of the costs of the appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 22nd day of September 2016**

In the presence of:

Mr. Isiji for the Appellant

Mr. Omondi for the Respondent

Ms Naomi Chonde Court Clerk