



This is the subject of this appeal.

2. At the time of his death the deceased was 45 years old, a fact not in dispute.

He was a civil servant in the Ministry of Lands with total earnings of Kshs.53,275/= per month.

His last payslip for the month of May 2012 showed a gross income of Kshs.53,275/= and numerous deductions, in the sum of Kshs.4,090/=.

These were the statutory deductions – P.A.Y.E Kshs.3,770/= and National Hospital Insurance Fund(N.H.I.F) Kshs.320 a is a total of Kshs.4,090/=.

Other deductions were for insurances, contributions to various welfare and other associations and loan deductions of Kshs.38,748/90 leaving a NET salary of Kshs.14,526/=. The above documents together with the death certificate and the deceased's children birth certificates were all produced as exhibits.

3. There is no dispute as to proof of dependency nor the monthly earnings, save for what constitutes the NET salary.

I have considered the trial courts judgment dated the 11<sup>th</sup> December 2013. In assessing the damages the court adopted a net salary of Kshs.14,526/= against a multiplicand of 2/3 years and a multiplier of 15 years.

During submissions, the appellants had proposed a salary of Kshs.53,275/= against a multiplicand of 2/3 and a multiplier of 25 years.

On the other hand, the Respondents put forth a NET salary of Kshs.14,525/= and a multiplicand of 2/3 and a multiplier of 12 years.

4. An award for loss of dependency is for the benefit of the deceased's dependants who are defined under **Section 4(1) of the Fatal Accidents Act** as the wife, husband, parent and child whose death was caused.

In the case **Beatrice Wangui Thairu -vs- Hon. Ezekiel Bargetuny & Another Nairobi HCCC 1638 of 198, Justice Ringera** (as he then was) held:

*“The principles applicable to an assessment of damages under the Fatal Accident Act are all too clear. The court must in the first instance find out the value of the annual dependency which is usually called the multiplicand.*

*In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning, life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the received in lumpsum and would if wisely invested yield returns of an income nature.”*

The above passage lays down the principles that ought to guide a court in the assessment of damages.

As I stated above, the main issue in this appeal is the deceased NET income. There seems to be no other dispute.

5. The deceased's May 2012 payslip had a gross salary of Kshs.53,275/=. Statutory deductions were Kshs.4,090/= leaving a balance of Kshs.38,748/90.

The appellant's submission is that the trial court ought to have adopted Kshs.38,748/= as the NET income on the basis that the Loans and Contributions to various Welfare Associations were for the benefit of his family, and therefore they ought not have been deducted from the deceased's gross earnings.

The above position was cited with approval in the case of **Simeon Kiplimo Murey & 3 Others -vs- KBS & 4 Others (2014) e KLR.**

The Respondent on the other hand submits that the trial court was in order in deducting from the gross salary not only statutory deductions but also other deductions to unions and others and cited the case **Kiarie Shoe Stores Ltd -vs- Hellen Waruguru C.A No. 58 of 2010.**

I have read the above decision. The circumstances thereof are different. The court was shown a payslip with a gross salary of Kshs.39,683/=.

From the same, the learned Judge stated what the deceased take home income was Kshs.16,036/=. There was no tabulation of the deductions from Kshs.39,683/= to Kshs.16,036/= a difference of Kshs.23,647/=.

I am not bound by the holding in the above decision. It is only persuasive.

6. I am persuaded to agree and abide by the principles stated in the **Beatrice Wangui Thairu**(Supra) and make a finding that the NET salary of a person's earnings is gross salary including allowances less statutory deductions (P.A.Y.E, N.H.I.F and N.S.S.F). It is also my finding that any other deductions towards union dues, contributions Sacco Loans and any other loans are assumed to be so deducted for the benefit of the family, that goes to the improvement of living conditions for the family.

The trial Magistrate's finding that since the **May 2012** payslip disclosed that the deceased was earning a net salary of Kshs.14,526/= after deductions were made from his gross of Kshs.53,275/= was erroneous as the deductions from the salary were infact a benefit to the dependants. My conclusion is that the Net salary of the deceased after the statutory deductions stated on paragraph five above ought to have been Kshs.38,748/90 per month.

7. I have stated that the only issue for determination in this appeal was the matter of the deceased's Net salary.

I therefore find the appeal meritorious and proceed to set aside the trial Magistrates award of damages for loss of dependency in the sum of Kshs.1,743,670/= and substitute the same with the following:

Kshs.38,743/90 X 12 X 15 X 2/3

= **Kshs.4,649,160/=**

Having determined the Loss of dependency as above, the total award of damages then is as follows:

Special damages	- Kshs. 89,550
Pain & Suffering	- Kshs. 20,000
Loss of expectation of life	- Kshs. 100,000
Loss of dependency	- <u>Kshs.4,649,160</u>
	- <b>Kshs.4,958,710</b>
Less damages under the	
Law Reform Act	- Kshs. 120,000

NET award

- **Kshs. 4,838,710**

8. The appellant shall have costs of the appeal.

**Dated, signed and delivered in open court this 27<sup>th</sup> day of October 2016.**

**JANET MULWA**

**JUDGE**