



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 2 OF 2015

BETWEEN

APHIA PLUS (PROGRAM FOR

APPROPRIATE TECHNOLOGY HEALTH APPELLANT

AND

CEPHAS OWUOTH NAJUMA & COLLINS NAJUMA

suing as legal representatives of the

estate of SELA AUMA NAJUMA (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. K. Mwendwa, RM at Principal Magistrates Court at Oyugis in Civil Case No. 97 of 2013 dated 10th December 2014)

JUDGMENT

1. In the subordinate court the respondents brought the suit on their own behalf and on behalf of the estate and dependants of the late Sela Auma Najuma who sustained fatal injuries as a result of a road traffic accident which occurred on 12th December 2011 along the Oyugis-Kisumu road at Nyamira junction. She was a pillion passenger on a motor cycle which collided with the appellant's motor vehicle. Although liability was initially contested, it was settled by consent with the appellant bearing 80% and the respondents 20%.
2. The issue in contest was the damages due to the respondents under the ***Law Reform Act (Chapter of the Laws of Kenya)*** and the ***Fatal Accident Act (Chapter 32 of the Laws of Kenya)***. The learned magistrate made the following award;

Pain and Suffering – Kshs. 10,000/-

Loss of expectation of Life – Kshs. 100,000/-

Loss of Dependency – Kshs. 1,440,000/-

Special Damages – Kshs. 20,500/-

Funeral Expenses – Kshs. 30,000/-

Less double entitlement –(Kshs. 100,000/-_

Total - Kshs. 1,500,500/-

Less 20% Contribution

Net Total – Kshs. 1,200,400/-

3. The appellant was dissatisfied with the award challenged the award on the following grounds set out in the memorandum of appeal dated 12th January 2014.
 1. *That the learned magistrate erred in law and in fact when he opted to apply a multiplicand of Kshs. 15,000/- whereas the Plaintiff failed to prove such income and the extent of the amount generated monthly, thereby venturing into speculation contrary to the threshold set out under the Evidence Act.*
 2. *That the learned trial magistrate erred in law and principle, by applying erroneous principle in computation of damages payable thus arriving at erroneous and grossly excessive estimates of general damages payable.*
 3. *The learned trial magistrate erred in law and fact when he failed to subject the costs payable to percentage contribution borne by the respondents.*
 4. *That the learned trial magistrate acted in error when he failed to properly evaluate evidence on record thus reaching an erroneous decision.*
4. Counsel for the appellant, Mr Otieno, reiterated the grounds of appeal in his submissions. He submitted that the learned magistrate erred in calculating the multiplier and multiplicand. He noted that the deceased was not in formal employment and that there was no evidence of such income apart from oral testimony to prove that the deceased was earning some income. In the circumstances, he urged that the sum of Kshs. 15,000/- awarded as the multiplicand was excessive.
5. The respondents supported the judgment and their counsel, Mr Odenyo, submitted that there was sufficient evidence of earnings in the form of market receipts which were produced. He argued that in any case, documentary evidence was not necessary to prove income. He contended that the appellant did not rebut the respondents' evidence and that the multiplier applied was consistent with decided cases.
6. This is an appeal on the issue of quantum of damages. The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).***
7. The respondents pleaded that at the time of death the deceased was aged 43 years and was a business woman making Kshs. 20,000/- per month. They proved particulars of the dependants that is, the widower, CN, a son aged 20 years, MN, a daughter aged 14 years, JN, a son aged 12 years and LN, a daughter aged 8 years. Cephas Najuma (PW 2) testified on behalf of the respondents. He stated that the deceased was a business lady dealing in second hand clothes and that she would earn between Kshs. 20,000/- and 30,000/- profit per month. He testified that she would buy 5 bales of clothes per week and sell the same at Kibuye market on Sunday, Monday and Thursday at Daraja market, Wednesday at Miruka and on Friday at Oyugis. He produced a bundle of receipts issued by the respective local authority evidencing remittance of market fees.
8. In considering the evidence, the trial court found that the respondents had proved dependency and the testimony of PW 1 was sufficient to establish such dependency. Although the appellant

proposed the sum of Kshs. 4,000/- as a multiplicand, the court was convinced that the sum of Kshs. 15,000/- was reasonable in the circumstances. As regards the multiplier the trial court adopted a multiplier based on the fact that she probably would have continued to carry on business until she was 60 years old.

9. The trial court also awarded Kshs. 20,000/- being compensation for legal fees for lodging the letters of administration, Kshs. 500/- for conducting the search for the motor vehicle and Kshs. 30,000/- was awarded for funeral expenses.

10. The appellant's main contention is that respondents did not prove their case. The duty of a plaintiff is to prove the case on the balance of probabilities. It is not requirement that the parties produce documentation to prove income and earnings. In **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR** the Court of Appeal observed that;

We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.

11. In **Theta Tea Company Ltd & Another v Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002]eKLR**, the Court of Appeal also expressed the view that;

[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors.

12. The testimony of PW 2 was sufficient to prove dependency. He demonstrated through producing birth certificates that he and the deceased were the parents of 4 children. In addition the deceased's funeral programme put this fact beyond the realm of speculation. He gave evidence of the nature of her business and her estimated income. The appellant attacked the market receipts produced on the ground that they were not made out to the deceased. I have examined the receipts and they are issued by the local authority and by their nature they are not made out to specific persons. They only show that the person to whom they were issued was trading in the market on a particular day. This evidence was not controverted. I cannot fault the learned magistrate for estimating the multiplicand at Kshs. 15,000/-.

13. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** stated that, "*The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.*" The multiplier is a function of how long the dependants would rely on the deceased. The deceased's last born was 8 years old which means she would probably finish school at the age of 20 years. Having considered the decisions cited by the parties and the fact that the deceased would continue to carry on her business for her lifetime, I cannot say that the multiplier of 12 year was beyond what was reasonable.

14. For the foregoing reasons, I therefore dismiss the appeal with costs to the respondent.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O. M. Otieno and Company Advocates for the appellant.

Mr Odenyo instructed by Khan and Associates Advocates for the respondent.