



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 506 OF 2009**

1. MARY KALUNDA SAMWEL
2. SIMON KYALO.....APPELLANTS

**VERSUS**

1. TELKOM KENYA LIMITED
2. CATHERINE WANBURA NJAGI.....RESPONDENTS

*(Appeal from the original judgment and decree of Hon. C.W. Meoli delivered on 18<sup>th</sup> August, 2009 in Milimani Commercial Court CMCC No. 942 of 2004)*

**JUDGMENT**

1. The Appellants have filed this appeal on the following grounds:-
  - i. *The learned magistrate erred in fact and in law in adopting a multiplicand of KShs. 1751 per month as a basis for assessing loss of dependency an amount well below the statutory minimum wage and without laying a basis for that amount.*
  - ii. *The learned magistrate erred in fact and in law in adopting a multiplier of 18 years as a basis for assessing loss of dependency.*
  - iii. *The learned magistrate erred in law in assessing damages on the loss of dependency principles when no evidence was led by the Respondent on dependency.*
  - iv. *The learned magistrate erred in fact and in law in adopting a dependency ratio of one-third when no evidence was led on dependency.*
  - v. *The learned magistrate erred in disregarding the Appellant's submissions on assessment of damages.*
  - vi. *The learned magistrate erred in disregarding the legal reasoning and decision of the Honourable Lady Justice Ang'awa in HCCC No. 2409 of 1998 NRB on the principle of assessment of damages as per the Law Reform Act and Fatal Accidents Act.*
  - vii. *The learned magistrate erred in fact and in law in believing the deceased's age as captured in the death certificate and then disbelieving the deceased's profession captured in the same death certificate and further erred in disbelieving evidence on oath on the deceased's profession.*
  - viii. *The learned magistrate gravely erred in disregarding submissions on various legal notices in particular legal notice number 87 of 2001 and 70 of 2009 that set out the minimum wage.*
  - ix. *The learned magistrate erred in fact and in law in failing to make any award on special damages for funeral expenses despite a persuasive authority tendered in submissions being HCCC No. 3177 of 1997 Nairobi in which decision his Lordship Justice Visram did award suitable damages for funeral expenses, a decision the learned magistrate was bound by.*
2. This appeal arises from the decision on a traffic road accident involving the deceased and motor vehicle registration number KAD 502A which was said to have occurred on 22<sup>nd</sup> January, 2002.

The 1<sup>st</sup> Appellant (PW1) who was the mother of the deceased testified that the deceased was aged 26 years at the material time. That prior to her death, the deceased was employed as a tailor earning KShs. 4,000/= per month. Wambua Musyoka (PW2) who was an eye witness stated that he was walking his guest when he witnessed the accident. He recollected that the deceased was walking when a vehicle approached from the opposite direction. While moving in a zigzag motion and at a high speed that it veered off the road and hit the deceased before overturning. PW2 stated that the deceased was not dead when he got to the scene but that the other person who was hit, died at the scene. He further stated that he could not recall the registration number of the said vehicle.

3. The trial magistrate heard the matter and entered judgment in favour of the Appellants. This being a first appeal *I am guided by the principles laid down in Peters v. Sunday Post (1958) E.A. 424 at 429 where it was stated:-*

*' It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'*

4. The principles to be applied by this court in the circumstances are well known. In the case of Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR) the Court held:-

*“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)”*

5. The Appellants sought damages under the Law Reforms Act and the Fatal Accidents Act. Great caution should be exercised in awarding damages under the Law Reforms Act and the Fatal Accidents Act to ensure that the awards are not duplicated. In Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727 the court stated as follows:

*“...the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act...This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-‘the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act’...anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya.”*

6. On proof of profession, the Appellant cited the Court of Appeal decision in Nairobi C.O.A No. 203 of 2001, Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v. Augustine Munyao Kioko where the court was of the view that production of certificates was not the only way of proving professions especially in cases of illiterate persons. I agree with the observation in Kimatu Mbuvi (supra) and add that the Respondents did not controvert the deceased's profession or salary and what is alleged by the Appellants stand as the truth. I, however, note that the salary as pleaded does not concur with the evidence tendered. While it was pleaded that the deceased earned a salary of KShs.

