



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 53 OF 2015

BETWEEN

JULIUS ORITA AYIECHA APPELLANT

AND

CONSOLATA ANYANGO ONDIJO &

ROSE ANYANGO OKOTH suing as the administrators of the

estate of ERIC OKOTH ONDIJO (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Mwendwa, RM in Principal Magistrates Court at Oyugis in Civil Case No. 41 of 2014 dated 15th April 2014)

JUDGMENT

1. The respondents, as personal representatives and administrators of the estate of the deceased, filed the suit against the appellant seeking compensation under the *Law Reform Act (Chapter 23 of the Laws of Kenya)* and the *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* as a result of a road traffic accident which occurred on 18th October 2013 at Kanu Market. The issue of liability was settled by consent of the parties with the appellant bearing 70% and the respondent 20%.

2. The matter proceeded for assessment of damages and the subordinate court made the following award;

Pain and Suffering	Nil
Loss of expectation of Life	Kshs. 100,000/-
Loss of Dependency	Kshs. 1,499,544/-
Funeral Expenses	Kshs. 30,000/-
Special Damages	Kshs. 26,000/-
Less Double Entitlement	Kshs. 100,000/-
Sub Total	Kshs. 1,555,544/-
Less 30% contribution	

3. The appellant appeals against the judgment on the following grounds set out in the memorandum of appeal dated 19th November 2013;

1. *The Learned Honourable Magistrate erred both in law and in principle, by applying erroneous principle in computation of damages payable both under the Law Reform Act and Fatal Accidents Act, thus arriving at erroneous and grossly excessive estimates of general damages.*
2. *The Learned Trial Magistrate erred in law and in fact when the same awarded special damages which were never proved in accordance with the law.*
3. *That the learned Trial Magistrate erred in law and in 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 the same failed to properly evaluate the evidence on record thus reaching erroneous decision.*

4. The parties filed written submissions in support of their respective positions. The appellant condensed the grounds of appeal two issues. First, that the dependency was not proved and second, that the deceased's earning were not proved. The appellant's position was that the loss of dependency is an issue of fact that must be proved by evidence. In this instance, counsel maintained that the persons named in the plaint were not actual dependants of the deceased. As regards the issue of the deceased's income, the appellant submitted that it was the burden of the respondent to prove that the deceased was a sand harvester and the court could not presume deceased's income and award damages when such income was not proved.

5. The respondents' supported the decision and submitted that there was sufficient evidence the respondent was married and had one child and that the deceased's income was proved to the requisite standard. Counsel urged that the appeal be dismissed.

6. As this an appeal on the issue of quantum the general principle 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 based on no 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. According to the plaint filed in the subordinated court, the action was brought by the respondents on their behalf and on behalf of Consolata Anyango Ondijo, the deceased's mother, Rose Anyango Okoth, the deceased's widow and Samwel Ochieng Okoth, the deceased's son. The respondents' pleaded that the deceased was 23 years old and that he was a small scale farmer and casual earning Kshs. 15,000/- per month.

8. The deceased's mother testified in the subordinate court and at the material part of her evidence she stated that;

I am the mother to the deceased, the plaintiff was married to Rose Onyango Okoth. They had a child namely; Samwel Otieno Okoth. I have a letter of from the chief. It is dated 20/11/2014. Erick (deceased) used to sell sand to earn a living. He used to make about Ksh. 800/- per day. I used to depend on the deceased.

9. As regards the issue of dependants, I am satisfied that the respondents' proved on the balance of probabilities that they were dependants. The letter from the Assistant Chief of Kobuya Location confirmed that the deceased was married with a wife and child. In the absence of evidence to rebut the evidence, I find that plaintiff proved that on the balance of probabilities that the deceased had a wife and child. As regards the deceased's mother, our law recognises that a parents are entitled to support from their children (see ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1985]**

4 KCA 217).

10. The evidence from the respondent was that the deceased used to sell sand to earn a living and would earn about Kshs. 800/-. In the absence of contrary testimony the fact of the deceased's earning was sufficient proof. As sand harvesting is by its nature casual, it would be wrong to insist on documentary evidence to show that he was doing such work (see *Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR*). Furthermore, in cross-examination, the deceased's mother stated that the motor vehicle that caused the accident was the one used to carry sand thus buttressing her testimony. The respondents' evidence on the issue of income was therefore un rebutted.

11. The learned magistrate held that the deceased was a miner and in order to determine his income, he referred to *Regulation of Wages (General Amendment) Order, 2013* to apply a multiplicand of Kshs. 9,314.75. Where there is proof of income which was sufficient to prove income, there was no need to fall back to the *Regulation of Wages Order*. I find support for this proposition in *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR* where Asike-Makhandia J., stated, "In absence of proof of income, the Trial Magistrate ought to have reverted to *Regulation of Wages (General Amendment) Order, 2005*" [Emphasis mine].

12. The appellant submitted that in the absence of proof, the court should consider a multiplicand of Kshs. 4,000/- on the basis that the deceased was at least earning some reasonable amount to support his family. I find no basis to accede to this demand in light of the clear un rebutted testimony of the deceased's mother that the deceased was earning income as a sand harvester.

13. The appellant argues that the costs awarded in the subordinate court ought to be awarded on the basis of contribution. I find no basis for this submission as the costs calculated based on the net total award made in favour of the successful party.

14. Finally, when the court makes an award under the *Fatal Accidents Act* it must, in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant of the deceased. As a child is a beneficiary, the court must also approve a scheme of investment. I therefore direct that the respondents to file the necessary application for consideration before the subordinate court in due course before the decretal sum is released.

15. For the foregoing reasons, I therefore dismiss the appeal with costs to the respondents.

DATED and DELIVERED at HOMA BAY this 29th day of October 2015.

D.S. MAJANJA

JUDGE

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

Mr Odongo instructed by Khan and Associates Advocates for the respondents.