



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CIVIL APPEAL NO. 54 OF 2015**

**BETWEEN**

**JAMES JUMA OLANGO.....APPELLANT**

**AND**

**RUTH AWITI ODERO & ROSE AGOLA ADHIAMBO suing as the administrators of the  
estate of TOM ODERO ONOLO (Deceased).....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.L.K. Mwendwa, RM in the Principal  
Magistrates Court at Oyugis in Civil Case No. 13 of 2014 dated 10<sup>th</sup> December 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 26<sup>th</sup> August 2013 along the Oyugis – Kisumu road near Nyatindo area. The deceased was riding a bicycle while the appellant was driving a motor vehicle. After hearing the matter, the learned magistrate apportioned liability equally between the appellant and the deceased. 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. 1,200,000/-
Funeral Expenses	Kshs. 30,000/-
Special Damages	Kshs. 500/-
Less Double Entitlement	Kshs. 100,000/-
Sub Total	Kshs. 1,230,500/-
Less 50% contribution	
<b>NET TOTAL AWARD</b>	<b>Kshs. 615,259.00</b>

2. The appellant appeals against the assessment of damages on the following grounds set out in the memorandum of appeal dated 15<sup>th</sup> June 2015;

1. *That the Learned Magistrate misdirected himself in making an award of General Damages in the sum of Kshs. 1,230,500/- which sum is excessive in the circumstances.*
2. *That the learned magistrate erred in law and in fact in adopting a multiplicand of Kshs. 15,000/- when the income had not been proved thus arriving at an excessively high amount under the loss of dependency.*
3. *That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on and authorities in support thereof.*
4. *That the learned trial magistrate misapprehended the principles applicable in computation of damages thus occasioning miscarriage of justice.*
5. *That the learned trial magistrate erred in law and in fact in failing to properly evaluate the evidence on record thus reaching an erroneous decision.*

3. The parties filed written submissions in support of their respective positions. Counsel for the appellant argued that the respondent did not prove that the persons named in paragraph 6(a) of the plaint were the deceased's dependants. In the circumstances the court should not have made the award. Counsel further submitted that the employment and income of the deceased was not proved on the ground that the trial court referred to certain contracts to conclude that the deceased was engaged as a contractor or a mason. The contracts were only marked for identification but not produced. In the circumstances, counsel urged that the court should have adopted the wage of a general labourer under the **Regulation of Wages General (Amendment) Order, 2012** which is Kshs. 4,577.00 per month.

4. The respondents' supported the judgment and submitted that the dependants and dependency was duly proved. Counsel submitted that there it was not necessary to prove income or earnings by documentary evidence and that the respondent had proved their case on a balance of probabilities. Counsel pointed out that the deceased was a mason and that the evidence was not rebutted. Counsel urged that the appeal be dismissed.

5. As this an appeal on the issue of quantum 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 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**).

6. According to the plaint filed in the subordinated court, the action was brought by the respondents on their behalf and on behalf of Ruth Awiti, the deceased's wife and the deceased's 5 children who were named. According to the plaint the deceased was aged 45 years at the time of his demise and was working as a mason earning almost Kshs. 15,000/- per month. The deceased's wife testified that the deceased was a contractor and was earning about Kshs. 50,000/- a month. In her evidence she referred to certain tenders that her husband was getting but the documents were only marked for identification.

7. As regards the issue of dependants, I am satisfied that the respondents' proved on the balance of probabilities that they were dependants. The deceased's widow gave detailed evidence of the children's ages and their schools leaving no doubt that they were her children. Further, the letter from the Chief of East Kamagak Location confirmed that the deceased was married with a wife and children. The presence of Rose Agola Odhiambo is easily explained by the fact that the law requires that where there is a continuing trust in favour of children, there must be two administrators and indeed the deceased's wife stated that Rose Agola Odhiambo was her sister in law. In the absence of evidence to rebut her testimony, I find that plaintiff proved that on the balance of probabilities that the deceased had a wife and children as pleaded in the plaint. The deceased's wife and children are dependants contemplated under **section 4(1)** of the **Fatal Accidents Act**.

8. In considering the evidence of income, the learned magistrate concluded that although there was evidence that the deceased's monthly earnings were scanty, he adopted the ***Regulation of Wages (General) Amendment Order, 2012*** to assess the deceased's monthly wage as Kshs. 15,000/-. The appellant does not dispute the application of the ***Regulation of Wages (General) Amendment Order, 2012*** but avers that the court should have had regard to the income of a general labourer in a rural area similar to where the deceased hailed from, therefore suggesting a monthly sum of Kshs. 4,577.20/- per month.

9. I reject the appellant's contention since the un rebutted testimony of the appellant was that he was a contractor and used to get tenders. The reference by the appellant to the ***Regulation of Wages (General) Amendment Order, 2012*** refers to general labourers including cleaner, sweeper, gardener, children's ayah, house servant, day watchman and messenger. This is a far cry for what the widow testified. Although the documentary evidence was not produced, it has been said time and again that 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***). In the circumstances, I cannot fault the learned magistrate's assessment of the multiplicand.

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

**DATED and DELIVERED at HOMA BAY this 30<sup>th</sup> day of November 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.