



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NO.7 OF 2011

(Appeal from the judgment and decree of the Hon. Mrs. J. Kwena – Principal Magistrate delivered on 11th January 2011 at Kericho in KERICHO CMCC NO.578 of 2004)

JESSA TRADING CO. LTD - 1ST APPELLANT
KIRAN KUMAR SHAH - 2ND APPELLANT

VERSUS

EMILY CHEBWOGEN TOWET (Suing as Personal Representative of the Estate of SAMWEL KIPRONO LANGAT (DECEASED) - RESPONDENT

J U D G M E N T

Emily Chebwogen Towett the Respondent herein in her capacity as the administratrix of the Estate of Samuel Kiprono Langat, deceased, filed a compensatory suit to recover damages for the fatal injuries suffered by the deceased as a result of a road traffic accident involving motor vehicle registration number KAD 417 which knocked down the deceased who was lawfully walking along Mau-Summit road on 29th July 2001. The aforesaid motor vehicle is said to be owned by Jessa Trading Company Limited, the 1st Appellant and was driven by Kiran Kumar Shah, the 2nd Appellant. The duo were then sued vide Kericho PMCC No.578 of 2007. The suit was heard by Hon. J. Kwena learned Principal Magistrate who in the end, found the Appellants to be 70% liable for the accident while the Respondent shouldered 30% liability. The learned Principal Magistrate proceeded to award the Respondent Ksh.926,425/- as special and general damages plus costs and interest less 30% contribution. Being aggrieved, the appellants preferred this appeal.

On appeal, the appellants put forward the following grounds:-

- 1. The Learned Trial Magistrate erred in law and in fact by awarding a sum of Ksh.768,000/= on the claim for loss of dependency, in the absence of any proof of the Plaintiff's relationship with the deceased and in the absence of any proof that the deceased had any children if at all, who survived him to found any legitimate basis for this award on loss of dependency.*
- 2. In the alternative and without prejudice to the Appellant's ground 1 above, the Learned Trial Judge erred in law and in fact awarding a sum of Ksh.768,000/= under the head of loss of dependency which was manifestly excessive in the absence of any legitimate and/or valid basis for plucking a sum of Ksh.8,000/= per month in the air as a basis for calculation and a ratio of 2/3 on an excessively high multiplier of 12 years yet in his judgment he had found as a fact that the*

Plaintiff had failed to prove that the deceased was carrying out the business of selling and buying livestock or any business at all.

3. *The Learned Trial Magistrate erred in law in fact by awarding the respondent special damages of Ksh.48,425/= yet only Ksh.10,925/= cost of obtaining letters of administration was proved.*
4. *The Learned Trial Magistrate erred in fact and in law in awarding cost to the Plaintiff yet the Plaintiff failed to prove and/or show t court any evidence that demand and notice of intention to sue was issued to the defendant and/or the insurance company.*
5. *The Learned Trial Magistrate erred in law and in fact in arriving at a judgment that was against the weight of evidence on record.*

When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.

The facts leading to the filing of the appeal are short and straightforward. Mrs. Emily Chebwogen Towet, filed the Compensatory suit in her capacity as the legal representative of the Estate of her late husband Samuel Kiprono Langat (*deceased*) under the Fatal Accidents Act and under the Law Reform Act against the appellants. It is said that on 29th day of July 2001, the deceased was lawfully walking along Mau-Summit road when Kiran Kumar Shah (*2nd Appellant*) carelessly and negligently drove motor vehicle registration number KAD 417Y causing it to violently crash the deceased fatally injuring him. The aforesaid motor vehicle is owned by Jessa Trading Company Limited. Learned advocates appearing in the matter recorded a consent order making the Appellants 70% liable while the Respondent shouldered 30% contribution. In the end the Respondent was given the following awards:

i. Loss of expectation of life	-	Ksh.100,000.00
ii. Pain & Suffering	-	Ksh. 10,000.00
iii. Special damages	-	Ksh. 48,425.00
iv. Loss of dependency	-	Ksh.768,000.00
TOTAL		- Ksh.926,425.00

v. Costs and Interest less 30%

It is the Appellant's contention that the learned Principal Magistrate erred when she made an award on account of loss of dependency yet the respondent had failed to prove that she was married to the deceased and that the persons listed as the deceased's children were indeed the deceased's children. The Respondent opposed this ground stating that she presented all the relevant evidence to establish she was a wife to the deceased under the Kipsigis Customary Law. I have considered the rival submissions over this ground. There is no disputed that the learned Principal Magistrate awarded the respondent Ksh.768,000/= on account of loss of dependency tabulated as follows: $8,000 \times 12 \times 12 \times \frac{2}{3} = 768,000/=$.

I have re-evaluated the case that was before the trial court and it is very clear from the record that the respondent gave uncontroverted evidence which established that she was married to the deceased under the Kipsigis Customary Law. It is a matter of common notoriety that marriage certificates are not issued for customary marriages. The letter of introduction from the area chief was used as vital evidence in obtaining limited letters of administration by the Respondent. The appellants further argued that there was no evidence to show that the persons named in the plaint were the deceased's children. I find this submission curious because it is not necessary to lay such evidence to prove the loss of dependency. It was enough for the Respondent to prove that he was a dependent together with her children. It is also not a condition for children to be the biological children of the deceased in order for them to qualify as dependants. The other argument which is related to loss of dependency is the monthly income used in the

multiplier. The appellant argued that there was no proof that the deceased was engaged in any form of business. The appellants argued that the Respondent had failed to produce receipts for the sale of animals. The Respondent was of the contrary view that there was sufficient evidence to establish the deceased's monthly income.

I have critically examined the recorded evidence and it is apparent that the Respondent tendered oral evidence of the deceased monthly earnings though not documentary. In rural Kenya, one does not expect a livestock dealer to keep records of his earnings from the sale of animals. The deceased's widow was able to show that the deceased used to provide food and other necessities to the family and that he used to pay school fees for the children. The learned Principal Magistrate fixed the deceased's monthly income at Ksh.8000/=. I think this is a reasonable estimate hence she cannot be faulted. I see no merit in this ground.

The appellants further attacked the award of special damage of Ksh.40,925/= being funeral expenses. The appellants argued that the Respondent failed to establish this claim when she failed to produce receipts. The appellant pointed out that the Respondent produced receipts in respect of the purchase of a coffin and transport which were not pleaded as a special damage. The record shows that the learned Principal Magistrate appreciated the fact that the Respondent did not tender documentary evidence but proceeded to award a global figure as funeral expenses. I think the learned Principal Magistrate did not exceed her discretion when she made the award. It is wrong for the appellant to aver that the prayer for funeral expenses was not pleaded yet the plea was made in paragraph 7 of the Plaint. The trial Principal Magistrate was entitled to give an estimate figure in view of the fact that people rarely kept receipts of funeral expenses. Courts have retained that discretion to enable them cater for unique special damages like funeral expenses. The final ground argued on appeal is that the Respondent should not have been awarded costs because she did not issue the requisite notice. The Respondent has been able to show that she served a demand notice dated 25th October 2001, therefore the Appellants' contention must fail.

In the end I see no merit in this appeal. The same is ordered dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 4th day of April, 2014.

J. K. SERGON

JUDGE

In the presence of:

- N/A for the Appellant.
- Mitei for the Respondent.