



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 92 OF 2012**

***(Being an appeal from the judgment and decree of Hon. Evans W. Muleka, Resident Magistrate in Hamisi RMCC No. 22 of 2011 delivered on 25th September, 2012)***

**CAROLINE LEAH AWINO ..... APPELLANT**

**VERSUS**

**STEPHEN MIHESO ASHIKOYO.....RESPONDENT**

**JUDGMENT**

This appeal arises from the decision of the subordinate court delivered on 25<sup>th</sup> September 2012 wherein the learned trial magistrate awarded special damages of Kshs.10,000/=, funeral expenses 25,000/=, pain and suffering Kshs.20,000/=, loss of expectation of life of Kshs.15,000/= and general damages of Kshs.560,000/= making a total of kshs.765,000/=.

Before delivery of judgment, liability had been agreed by consent at 80% for the defendant who is now appellant, and 20% for the plaintiff who is now respondent. The figure awarded to the respondent was therefore reduced by 20% contributory negligence coming to a net award of Kshs.612,000/= plus costs and interest.

The appellant who was the defendant, was dissatisfied with the decision of the trial court. He has now filed this appeal through his counsel Onyinkwa & Co. advocates. The grounds of appeal are as follows -

1. That the learned trial magistrate erred in law and fact by failing to observe the laid down principles in law in awarding damages therein.
2. The learned trial magistrate erred in law and fact in using the wrong principles in awarding damages under loss of expectation of life.
3. That the learned trial magistrate erred in law and fact in awarding the sum of Kshs.150,000/= as damages for loss of expectation of life.
4. That the learned trial magistrate erred in law and fact in considering irrelevant factors and making a decision under loss of expectation of life.
5. That the learned trial magistrate erred in law and fact in awarding damages under the Fatal Accidents Act.
6. That the learned trial magistrate erred in law and fact in adopting a dependency ratio of 2/3 when no proof of pendency or evidence of pendency was proved.
7. The learned trial magistrate erred in law and fact in adopting a multiplier of 7 years.
8. The learned trial magistrate erred in law in adopting a multiplier of Kshs.10,000/= when no proof of income was proved.
9. The learned trial magistrate erred in law and fact in awarding damages under the Law Reform Act

as well as under the Fatal Accidents Act against the well laid down principles of law.

Before the appeal was heard, counsel for both parties filed written submissions. They relied on various cases. When the appeal came up for hearing on 24/2/14, Mr. Osango who held brief for Mr. Onyinkwa for the appellant and Mr. Shivega who held brief for Mr. Chanzu for the respondent, relied on the written submissions. I have read and considered both sets of submissions.

This appeal is an appeal on quantum of damages awarded, and the principles used in assessing and awarding the same. Liability was admitted by consent.

Though the hearing of the case was by way of formal proof, the respondent had the burden of proving on the balance of probabilities the entitlement and basis for assessment of the quantum of damages. In the case of *Kirugi & Ano. -vs- Kabiya & 3 others [1987] KLR 347* the Court of Appeal stated that the burden is always on the plaintiff to prove his case on the balance of probabilities, and that such burden is not lessened even if the case is heard by way of formal proof.

It was therefore incumbent on the respondent to establish, on the balance of probabilities, through evidence that the quantum of damages to be awarded was well grounded.

Since this appeal is on the damages awarded by the trial court, I have to caution myself that an award of damages is a function of the exercise of discretion by the trial court. An appellate court should be slow to interfere with such award unless the same is either inordinately high or low, or represents an entirely erroneous estimate. This position was clearly stated by the Court of Appeal in the case of *Butt - vs- Khan [1977] 1 KLR 1*, where the court stated -

***“An appellant court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge (magistrate) proceeded on wrong principles, or that he misapprehended the evidence in some material aspect and so arrived at a figure which was inordinately high or low.”***

The first complaint of the appellant is that the learned magistrate erred by using wrong principles in awarding damages for loss of expectation of life. With regard for the award on loss of expectation of life, the learned magistrate awarded Kshs.150,000/=. In doing so the magistrate stated as follows -

***“Loss of expectation of life. Under this topic, the deceased was 75 years old and if he were employed in Government, then he was way passed his retirement age and hence research puts Kenyans life expectation at 45 years. Meaning at 75 years of age, his productivity levels were falling if not have fallen tremendously. So if the deceased was to be added 7 years of active life and an average making of Kshs.2,000/= per year, this would result in a total of Kshs.140,000/= I therefore feel that the Kshs.150,000/= requested as loss of life is reasonable and hence Kshs.150,000/= will be enough.”***

Counsel for the appellant says that the learned magistrate considered irrelevant facts in arriving at the above figure. I observe that the learned magistrate referred to matters in the judgment which were not in the evidence. Though it was the evidence that the deceased was aged 75 years, there was no evidence on the service of Government employees, and their retirement age. There was no evidence regarding the life expectancy in Kenya of 45 years. There was also no evidence of productivity levels of the deceased falling tremendously.

The evidence of the plaintiff was that the deceased was aged 75 years when he died. He was his father. That he had obtained letters of administration and a burial permit. That the deceased used to buy and sell cows and got a profit of about Kshs.10,000/=. It is therefore clear that the learned magistrate took into account matters which were not supported through evidence. Did the irrelevant factors considered by the magistrate vitiate the award for loss of life expectancy? In my view, the award for loss of life expectancy is akin to loss of earning capacity, if the deceased was alive. Though the magistrate found that the deceased was earning kshs.2,000/= per year, which he translated to “per month”, as the

total figure shows, in my view that figure would not be said to be an exaggeration. The deceased was said to be healthy. He was said to be earning 10,000/= from sale of cows. He would definitely be going around his daily activities as he was of good health. I do not think that with the current value of money, he did not have the ability to earn Kshs.2,000/= per month. That was a conservative figure. The multiplier of 7 years of active life, in my view, is also not a wild guess, taking into account that the deceased was healthy.

Though the appellant is challenging the figure of Kshs.150,000/= awarded for loss of life expectancy, I find that figure to be reasonable. The figure suggested by the appellant's counsel at the trial of Kshs.75,000/=, in my view is inordinately low.

The second attack on the judgment is that the learned magistrate erred in awarding damages also under the Fatal Accidents Act. Indeed the learned magistrate awarded such damages. In doing so, he stated as follows -

***“General damages under the Fatal Accidents Act will be as follows -***

***A multiplicand of Kshs.10,000/- is enough and a multiplier of 7 years which comes to the following -***

$$10,000 \times 12 \times 7 \times 2/3 = 560,000/=.”$$

Counsel for the appellant submitted that when damages are awarded under the Law Reform Act, the court should not award damages under the Fatal Accidents Act. In my view, that proposition by the counsel is not correct. Under the Fatal Accidents Act, the court is considering dependency. That dependency has to be proved by evidence. Therefore damages can be awarded under both the Law Reform Act and the Fatal Accidents Act. This point was reiterated in the Kisumu High Court Civil Appeal No. 61 of 2007 between **Richard Omino -vs- Christine Onyango** where the court emphasised what was stated in the earlier case of **Kenfro Africa t/a Meru Express Services 1976 & Another -vs- Lubia [1987] KLR 30** as follows –

***“With regard to ground three, it is apparent that the amount awarded as general damages under the Law Reform Act be discounted or deducted from the award made under the Fatal Accidents Act. This expectation is erroneous as may be demonstrated by holding No. 7 and 8 in the case of Kenfro Africa Ltd. t/a Meru Express Services (supra) to the effect that –***

***7. The Law Reform Act (Cap.26) Section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has a right to sue under the Law Reform Act in respect of the same deaths.***

***8. The words to be taken into account and the words to be***

***deducted are two different things. The words in Section 4 (2) of the Accident Act are taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he was awarded under the Law Reform Act for non-pecuniary loss. There was no requirement in law of otherwise for him to engage in mathematical deductions.***

In the present case, was dependency proved? The evidence on record on this aspect is that of the respondent who claims to have been a son of the deceased. He stated in cross-examination that he was not the only son. But he did not give evidence that he depended on him. He stated that he had a living

mother called Truphena, and a sister called Phoebe who was married. He stated that he was a farmer.

In my view, though damages could be awarded under the Fatal Accidents Act for loss of dependency, in this particular case no dependency was proved. The respondent did not state how, at his age, he was depending on his old father. The mother and sister did not testify in court. No explanation was given for their failure to attend court to give evidence on dependency. It follows that dependency as a fact was not proved by evidence as required by law – see the case of **Joseph Wachira Maina -vs- Mohamed Hassan [2006] e KLR** cited by counsel for the respondents, as they relate to the award of damages for dependency under the Fatal Accidents Act.

I find that the award of general damages under Fatal Accidents Act was not based on evidence. The same was not justified. I will therefore quash that item. This also disposes of all rounds of appeal.

The other awards do not appear to have been challenged on appeal.

I therefore set aside the award of Kshs.560,000/= general damages for dependency under the Fatal Accidents Act. I uphold the awards of the trial court on special damages, funeral expenses, pain and suffering and loss of expectation of life, subject to the 20% contribution agreed by the respondent as well as the trial court's order on costs and interest. The appeal is allowed to the above extent. The appellant will pay 50% of the respondent's costs of this appeal.

***Dated and delivered at Kakamega this 29th day of May 2014***

**George Dulu**

**JUDGE**