



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 286 OF 2004**

**MRS BEATRICE W. MURAGE (Suing as the legal Representative**

**and administrator of the state of the late Isaac GICHERU MURAGE) ....APPELLANT**

**VERSUS**

**CONSUMER TRANSPORT LTD.....1<sup>ST</sup> RESPONDENT**

**LUNABALA MAGDA BULOPA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This is an appeal against the decision of the Senior Resident Magistrate delivered on 17/11/2004 in Nakuru Civil Case 459/2003. The trial court awarded the plaintiff a sum of Kshs.137,350/- against which she appeals. The grounds on which the appeal is premised are:-

1. That the trial court was not guided by the correct principles in arriving at the award which was excessively low;
2. That the trial court fell into error by disregarding all the evidence adduced and placed before it.

The issue of liability had already been settled at 50% and the only issue that the magistrate determined was one of quantum.

Mr. Karanja Mbugua, counsel for the appellant filed written submissions in support for the grounds and urged that the trial magistrate did not set out issues for determination as required of her under Order 21 Rule 4 of the Civil Procedure Rules; that she did not determine issues on pain and suffering, and failed to make an award on loss of expectation to life; that on loss of dependency the court did not consider how long the deceased may have lived, or what his earnings were and that the court totally failed to consider her submissions and wrote a casual judgment.

Mr. Wamaasa, counsel for the respondent opposed the appeal and also filed submissions. It was his submission that the deceased's estate failed to prove that they suffered loss and that PW1 the widow of the deceased, did not state how much the deceased earned at the time of death and there was no basis for applying a salary of Kshs.30,000/- as suggested by the appellant. He said that active life is between 18 to 55 years and at most 70 years which the deceased had passed; that the court's judgment was solomonic and that all beneficiaries were adults save for one who was 16 years old.

As regards loss of expectation of life, counsel urged that it was not clear what loss was suffered the deceased having attained 74 years of age. Counsel wondered why in the lower court, the appellant claimed Kshs.850,000/- and now claims Kshs.4.8 million.

As for the Kshs.10,000/- for pain and suffering, the counsel urged that court to correct the mistake and allow it.

The respondent did not raise issue with Kshs.34,700/- being special damages that were proved.

It was held in the case of **Kamau v Mungai & Another (2006)1 KLR 150**, that it is the duty of the first appellate court to re-evaluate the evidence, assess it, and reach its own conclusions remembering that it did not see or hear the witnesses and hence make due allowance for that.

It is trite law that a court on appeal will not normally interfere with a finding of fact made by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the magistrate/judge is shown to have acted on wrong principles in reaching the finding he did. In **Kamau** case (supra), the court cited the case of **Peters v Sunday Post (1958) EA 424 at pg 429**, where O'Connor said:-

**“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 function which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”**

I have perused the judgment of the trial court and I also agree with the appellant that the trial court did not comply with Order 21 Rule 4 of the Civil Procedure Rules which provides that a judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The trial court only summarized the case and gave a decision with no reasons.

No doubt the deceased died at an advanced age of 74 years. His active life had really come to an end. The magistrate did not consider the issue of loss of expectation to life. Although the appellant claims that the court should have considered it, the respondent's view is that having attained that age, the estate did not suffer any loss of expectation to life. In my view, the deceased was still alive till his life was cut short through the fatal accident. He still expected to live even if for one more day. He may have been one of the lucky ones to live long. And in taking into account the preponderances of life, I would find that since there was no evidence of sickness, the deceased may have lived for another 4 years.

The issue of liability having been settled, only the widow of the deceased testified. It was her evidence that the deceased was 74 years old at the time of death, owned 30 hectares of land, used to plant wheat but denied that he did any business. PW1 did not file any books of accounts or demonstrate how much the farm produce earned, for example by production of bank accounts.

Every party is bound by its own pleadings. In the plaint at paragraph 10 thereof, it was pleaded that, **“he was enterprising businessman and contractor and his income was in excess of Kshs.95,000/- per month...”** However, PW1's evidence was totally contradictory as to what the deceased was engaged in for a living. She said that he was a farmer in wheat having 30 Ha of land and kept cattle. However, there was no shred of evidence adduced to support the said evidence or the allegations in the plaint. With the evidence contradicting the pleadings, the court cannot know what the deceased did for a living if at all. I find the submission that the deceased earned Kshs.30,000/- per month totally baseless. Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage. However, in this case, the minimum wage cannot apply because the deceased was beyond employment age and there is totally no evidence that he earned anything for a living. Although the lower court did not give reasons for its decision, which it should have, I will find that the deceased was a retired old man who must have been resting at home. In the plaintiff's submissions in the lower court, the plaintiff had suggested a multiplier of 3 years, a dependency ratio of 2/3 and a sum of Kshs.720,000/- was suggested for loss of dependency. It is surprising that counsel without reason now escalates the figures and wants this court to make an award of 4.8 million. I wonder where that came from. He is the same counsel who appeared for the plaintiff in the trial court. This case is not being heard afresh. The court will only rely

on the submissions made in the lower court as regards the award. In the lower court, the plaintiff relied on the case of **Esther Wambui Kimani v Dominic Kamau HCC 1241/2001**, where the deceased was aged 50 years at the time of death and the court used a multiplier of 5 years as against a dependency ratio of 2/3. To the extent that the appellant totally failed to prove the deceased's income, I have no reason to differ from the trial court's finding. The award of Kshs.2,000/- was generous considering that this award was made in 2004, 10 years ago. I will adopt the same figure. The deceased left a young boy of 16 years and the wife. The other persons named as his dependents are the grandchildren of the deceased who have parents. I would allow a ratio of dependency at 2/3. In the end, loss of dependency would be calculated as follows:-

$$2,000 \times 4 \times \frac{2}{3} \times 12 = 64,000.00$$

The respondent did not dispute the award for pain and suffering which was Kshs.10,000/-.

Having found that the deceased would have lived for 4 years, in my view, the trial court erred in not making any award on the heading of loss of expectation of life. In the lower court, the appellant's case made a submission of Kshs.140,000/- and now raises it to Kshs.200,000/- In my view, an award of Kshs.120,000/- will suffice. The respondent did not dispute the figure of Kshs.34,700/- as proved special damages.

In the end, the appellant will have judgment as follows:-

Loss of dependency	-	Kshs. 64,000.00
Loss of expectation of life	-	Kshs.120,000.00
Pain and suffering	-	Kshs. 10,000.00
Special damages	-	<u>Kshs. 34,700.00</u>
Total	=	Kshs.228,700.00
Less 50% contribution	-	<u>Kshs.114,350.00</u>
<b>TOTAL</b>	<b>=</b>	<b>Kshs.114,350.00</b>

There will be interest from the date of the judgment till payment.

Ordinarily, the award for pain and suffering and loss of expectation of life under the Law Reform Act would be deductible from the loss of dependency so that the appellant does not benefit twice but since the figure is very low, I will not subtract. Since this appeal was unnecessary because the trial court had been generous with its award, I condemn the appellant to meet the costs of this appeal.

**DATED and DELIVERED this 27<sup>th</sup> day of June, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. K. Mbugua for the appellant

Mr. Nyamwange for the respondents

Kennedy – Court Assistant