



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 18 OF 2008**

**ASHA MOHAMED**

**SWALEH.....RESPONDENT**

**VERSUS**

**1. KENNEDY BINDI MURIUNGI**

**2. JOYCE NYATIGO.....APPELLANT**

**Coram:**

**Ms. Obura for Miss Ngigi for Appellants**

**Gor for Respondent**

**Court Clerk Furaha**

**JUDGMENT**

The record of the appeal whose decision is about to follow, was filed in court on 25<sup>th</sup> May, 2010. The appeal arose from the judgment delivered by the lower court on 29<sup>th</sup> January, 2008. The plaintiff/respondent suing as mother and administratrix of the estate of the late Maulid Said Kombo, filed the action under the Fatal Accidents Act following the road accident that took place on Makupa Causeway Mombasa, as the deceased was walking along that road. It was claimed at the accident spot, the 1<sup>st</sup> appellant/defendant drove the 2<sup>nd</sup> appellant/owners of motor vehicle registration number KAR 021G so negligently that it hit Kombo fatally. So the respondent sought remedies of loss of dependency as well as special damages. It was pleaded that the deceased aged 34 years at time of the accident, earned Shs. 5,000/= per month all of which he spent on maintaining his mother (the respondent).

The defendants filed a defence denying the occurrence of the accident and/or that it was due to negligence on their part. They threw back the negligence on the deceased. A reply to the defence could not hear of that and the trial proceeded before the learned trial magistrate. In the judgment that formed part of the record of appeal, the lower court's finding was a total of Shs. 572,000/= for the respondent covering loss of expectation of life, loss of dependency and funeral expenses. Loss of dependency attracted an award of Shs. 600,000/=.

In the 4-point appeal it was contended that the respondent did not qualify as a dependant under section 4 of the Fatal Accidents Act; the learned trial magistrate awarded manifestly excessive damages and he fell

in error to adopt a multiplier of 20 for a 35 year old deceased.

Directed to submit, the appellants' side claimed that there was no evidence adduced before the learned trial magistrate that the deceased earned Shs. 5,000/= per month. The respondent had spoken of Shs. 1,000/= earned by the mechanic/deceased per week and so the income could be put at Shs. 4,000/= per month. And further, that there was no evidence that the deceased was indeed a mechanic anyway. Accordingly the learned trial magistrate had no basis on which to make the award for loss of dependency. It appears as if the appellants chose to confine their appeal mainly on this item.

The respondent's position was that the lower court correctly found that the deceased was a mechanic earning Shs. 5,000/= per month and accordingly computed the loss of dependency. The appellants did not call evidence to controvert that. So the learned trial magistrate's decision should not be disturbed.

In the evidence of the respondent before the learned trial magistrate she said:

**“My deceased son was a mechanic. I was living with him. I am a widow. He used to go to work every day. He used to give me Shs. 1,000/= per week.....Now .....I have nobody to feed me.”**

In cross examination the respondent added that the deceased only told her that he was a mechanic but not trained. She did not know where his garage was.

Clearly there was no evidence that the deceased was a mechanic e.g. a licence/permit to run such a business, usually given by local authorities. The respondent did not know even where he operated from. He simply went to work every day and gave his mother Shs. 4,000/= per month - not Shs. 5,000/= as pleaded in the plaint. The best the learned trial magistrate could have done in such circumstances was to base the multiplicand on Shs. 4,000/= per month because the respondent told the court that the deceased used to give her Shs. 1,000/= per week. Or use a random sum he could consider reasonable income for casual labourer's as the base of income, because it could have been unreasonable not to allocate any sum of income to a man 34 years of age who used to go to eke out a living daily. But there was no basis to take Shs. 5,000/= as monthly income as pleaded and ignore what had been stated in evidence. In that regard the learned trial magistrate fell in error when he took the deceased's income as Shs. 5,000/= per month. Nothing was placed before court to challenge the respondent's dependency or the multiplier of 20 (the lower court actually took 15), all that remains, as found/adopted by the learned trial magistrate. Accordingly, the award of loss of dependency is varied as to a figure of Shs. 480,000/= ( $4,000 \times \frac{2}{3} \times 15 \times 12$ ).

The rest of the awards remain as the learned trial magistrate found. The total judgment sum to be adjusted accordingly following this court's variation above.

In sum, this appeal is allowed to the extent stated regarding loss of dependency. The appellants to get one third of costs of this appeal.

Dated and delivered on 26<sup>th</sup> June, 2012.

**J. W. MWERA**

**JUDGE**