



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 144 of 2001**

**ONESMUS MAINGI ..... 1<sup>ST</sup>  
APPELLANT**

**MORRIS KINOTI M'RITHARA.....2<sup>ND</sup>  
APPELLANT**

**V E R S U S**

**SUSAN KENDI MBUI (suing as the administratrix of the**

**Estate of STEPHEN MBUI (DECEASED).....  
.....RESPONDENT**

**JUDGMENT**

1. This appeal originates from the Judgment and decree in Meru CMCC No. 228 of 2001 in which the learned trial magistrate awarded the Respondent Ksh.350,278/- in general and special damages plus costs and interest thereon. The suit arose after the death of Stephen Mbui in a road accident involving motor vehicles registration numbers KAH 948 P and KAA 987 M on 30.9.2000 at 6 P.M. along the Nanyuki – Isiolo – Meru Road. Judgment on liability at 85% was entered in favour of the Respondent with the Respondent shouldering 15% Liability. The final judgment being appealed from was limited to quantum of damages payable and the Memorandum of Appeal has 3 grounds which in sum total raise only one question; was the amount in damages reasonable and was it so excessive as to warrant interference by this court? Alongside that fundamental question is the question whether the learned trial magistrate misunderstood the law or applied the wrong principles in quantifying the damages payable.
2. It is trite law that for a court sitting on Appeal with regard to an award of damages to interfere with that award, it must be shown that the award is so inordinately low or high as to represent an entirely erroneous estimate based on some wrong principle or misapprehension of the evidence (see Hancox J.A. in Shabani vs. City Council of Nairobi [1985] KLR 516 approving the holding in Butt vs. Khan Civil Appeal 40 of 1977)
3. In the instant case, it is said that the learned trial magistrate used a multiplicand of Ksh.4,000/- in assessing loss of dependency without giving a basis for using that sum whatsoever. Further that since there was no evidence of the deceased’s earnings, the use of the sum of Ksh.7050/- as his monthly earnings was erroneous as proof of income was mandatory. The other argument is that the principles applicable in awarding damages under the Fatal Accidents Act and the Law Reform Act were not followed as the damages awarded under the latter should have been taken into

account in awarding the former.

4. As regards special damages, the point is made that where funeral expenses are sought, there must be strict proof of the expenses otherwise the same is not payable. That in the instant case, the proof was suspect as the payment was made by another person other than the Respondent and that the same cannot then be paid to the Respondent.
5. I have noted the response to the Appeal and with regard to the issue of the multiplicand of Ksh. 4,000/- used in computing loss of dependency, it is my understanding that loss of dependency and in respect of the multiplicand is the amount that the Plaintiff would have been earning at the date of the trial had he not been injured or even killed. In McGregor on Damages, 16<sup>th</sup> ed. Page 1026 Para 1572 it is stated as follows:-

**“The starting point in the calculation of the multiplicand has long been the amount earned by the plaintiff before the injury. However, since the decision in Cookson Vs Knowles [1979] AC 556 in the related field of fatal accidents, the starting point has now through the stimulus of inflationary conditions, become the amount that the plaintiff would have been earning at the date of the trial had he not been injured; as Walter L.J. put it in Auty vs National Coal Board [1985], W.L.R. 784 the limit to which inflation should influence the assessment of future loss is to take the loss at date of trial and not at date of accident and no more”.**

6. From the arguments in the Appeal it would seem to me that the multiplier of 10 years is not contested and so I will say nothing on it. Returning to the multiplicand, the learned trial magistrate in his judgment said:-

**“The deceased Stephen Mbuyi was 43 years at the time of his death on 30.9.2000. He was employed as a driver by Cyprian P. M’Ringera at ksh.7,500 per month. He was also a farmer cultivating various subsistence crops and kept cattle. The total income per month was put at Ksh.12500....There was however no document (*sic*) to support this income. I will consider it conservatively to be Ksh.4,000 and take 2/3 as dependency ratio...”**

7. The learned trial magistrate was alive to the fact that no document was produced to support the income but gave a reasonable provision for obvious reasons obvious because. It was pleaded that he was employed as a driver and was in fact killed while driving motor vehicle registration number KAA 987 M. I take the view that since employment was not contested and liability was admitted, that the court was obligated to provide a reasonable multiplicand to fit the circumstances and the principle in Cookson (supra) that income at the date of trial ought to be taken into account. In fact the learned magistrate was very conservative in his estimate and I see no need to interfere with that estimate; had I had done so, it would be for a higher multiplicand but I have not been asked to do so and so I will not.
8. The argument regarding Ksh.7500/- as monthly income falls by the wayside in view of my comments above and that is why I shall say little of it since the learned trial magistrate merely noted the figure and did not use it in creating the multiplicand for the computation of damages under the head of loss of dependency where clearly it is apparent that the deceased had employment but the survivor cannot produce evidence of income and the court based on the pleaded amount should and ought to make a reasonable provision for the income more so where liability has been admitted for the fatality. Injustice would otherwise be occasioned to very deserving parties such as the Respondent in this case.
9. The other point is that of damages under both the Law Reform Act and the fatal Accidents Act. In Maina Kamaru and another vs Josephat Muriuki Wangugu C.A. 14/1989 the Court of Appeal in explaining the principle said:

“The rights conferred by s.2 (5) of the Law Reform Act (Cap 26 Laws of Kenya

the benefit of the estate of deceased persons are stated to be in addition to and not in derogation of any

rights conferred on the dependants of the deceased persons by the Fatal Accidents Acts. This does not mean that damages can be recovered twice but that if damages recovered under the Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act.....”

10. In this case, the learned trial Magistrate awarded Ksh.320,000/- as damages under the Fatal Accidents Act and Ksh.80,000/- under the Law Reform Act. Applying the principle above, the damages under the Law Reforms Act must be taken into account in reducing the damages under the Fatal Accidents Act. In line therefore with the reasoning of Sitati J. in Kenya Wildlife Services and Another vs Silverster Nkanda Kaunyangi HCCA 24/2002 (Meru) the general damages available ought to be as follows:-

a) under the Fatal Accidents Act - Ksh.320,000/-

b) Under the Law Reform Act - Ksh.80,000/-

c) Pain and suffering - Ksh.15,000/-

Ksh.415,000/-

Less damages the law Reform Act Ksh. 80,000/-

- Ksh.335,000/-

11. As for Special Damages, the learned trial magistrate awarded Ksh.4,150/- which is the sum pleaded in the Plaint. Looking at the evidence I note that what was proved by receipts were;

(a) P.Exh. 5 – Kshs 900/- (Mortuary Charges)

(b) P.Exh. 6 - Kshs 150/- (death certificate)

(c) P.Exh. 7 - Kshs. 100/- (Police Abstract]

Kshs. 1050/-

12. I do not make much of the argument that the Respondent did not expend Ksh.900/- as mortuary charges merely because one Francis Kiambati paid on “**her behalf**”. However there was no basis for Ksh. 3,000/- to have been awarded as funeral expenses including for the coffin as the same was not strictly proved, a cardinal principle in any award of special damages (see Hahn vs Singh [1985] KLR 716 per Kneller JA at page 721) It was therefore not enough to claim or plead that amount and then fail to prove it. That part of the claim for special damages must be dismissed.

13. This being the case the Judgment sum is adjusted and the trial court’s judgment substituted as follows;

a) General Damages - Ksh. 335,000/=

b) Special Damages - Ksh. 1,050/=

Ksh.336,050.00

Less 15% contribution Ksh. 50,407.50

Total Ksh.285,643.50

14. The Appellant having only partly succeeded will have ½ costs of this Appeal.

15. Orders accordingly.

**Dated, signed and delivered in open court at Meru this 25<sup>TH</sup> day of April 2007.**

**ISAAC LENAOLA**

**JUDGE**

**In The Presence Of**

Mr. Mosota holding for Mr. Kariuki Advocate for the Appellant

Mr. Kiogora Advocate for the Respondent

ISAAC LENAOLA

**JUDGE**