

damages

(4) The Refusal and/or denial of funeral expenses

4. The Grounds of Appeal express that as follows:

(i) That the learned Magistrate erred in law and in fact by adopting a dependency ratio of $\frac{1}{3}$.

(ii) That the learned Magistrate erred in law and in fact in failing to award funeral expenses.

5. The Respondent/Defendant in the Subordinate Court below opposes the Appeal. The Respondent argues in its Written Submissions that there has been no error in principle. It is argued that in relation to the level of income, there was no evidence on the record. However, it is argued that the trial court found that the income alleged was in fact earned by the wife. There was, it is said similarly that there was no evidence of funeral expenses. The special damages proved were the costs incurred by the Administrator to obtain limited grant and bring the suit.

6. The Appellant's submissions argue that the trial Court's findings go against the weight of the evidence and are an incorrect application of the law. As this is a first appeal, this court has to be satisfied that the Decision of the Trial Court was wrong in principle.

7. It is necessary to take each head of damage in turn. Firstly, the Plaintiff alleged that the Defendant's vehicle caused the death of the Plaintiff. The Trial Court accepted that claim and awarded liability at 100% against the Defendant. As a consequence of the accident, the Estate of the Deceased claimed damages for pain and suffering. An award was made under that head. This Court would expect a finding on such an award to be accompanied by an analysis of the injuries suffered and not consideration of a global figure based only on the fact that death, though not instantaneous which occurred a day later. A global figure of Kshs. 100,000/= appears to have been plucked from thin air, and then it is totally discounted in the Decree.

8. There is a further claim by the Estate for funeral expenses on the basis that it is a claim for special damages and without documentary evidence. Therefore, the Judgment goes the award must be nil. That finding goes against the weight of the evidence. The evidence on the record shows that the Deceased was injured. He was taken to a medical facility, he was then taken to a second medical facility but he sadly passed away. It is therefore inconceivable that he would thereafter have been disposed of without some kind of burial and/or funeral however humble. The judgment of the trial Court ignores that reality and therefore is wrong in principle. The cause of death was a head injury and therefore there must have been significant pain which should have been assessed. The Administrator ad litem gave evidence on oath as to funeral costs. The trial court disbelieved that evidence in its entirety but failed to give its reasons for doing so.

9. The family of the Deceased, as dependents, have made a separate claim for loss of dependency. On this claim the court heard the oral evidence of the widow supported by the documentary evidence attached to the Plaint. Noteworthy in that documentary evidence was a Chief's letter setting out the ages of the six (6) children, two of whom were said to be school going. That evidence was not challenged on cross-examination. However, the trial court disbelieved the evidence of the widow and decided there was only one dependent. The widow was declared to be self-sufficient and therefore not dependent. Again, reasons were not given for preferring that version.

10. On computation, the awards should be given consideration, in particular, the treatment of the separate claims under the Fatal Accidents Act and the Law Reform Act. The two are distinct claims brought by distinct parties notwithstanding that the convention is to plead them in the same suit. The Learned Trial Magistrate held "*Having so determined, the estate of the deceased deserves compensation for the loss suffered. The claim is made under the Fatal Accidents Act, Chapter 32 of the Laws of Kenya and the Law Reform Act, Chapter 26 of the Laws of Kenya.*". However, thereafter, they were treated as one claim seeking double recovery and the computation discounts one. In the circumstances this Court is satisfied that he learned trial Court erred in principle.

11. On the question of general damages for pain and suffering, the Learned Trial Court awarded Kshs. 100,000/=. The Appellant is not asking this Court to interfere with either award. The Appeal is limited to the question of the dependency ratio. The trial Court heard the oral testimony of the widow. She stated she and her husband together undertook a business where he sourced fish and she was responsible for selling it. She produced receipts from the market. The learned trial court disbelieved that evidence and instead decided that the Deceased was a welder, for which there appears to be no evidence on the record. Having decided that the Deceased was semi-skilled, the learned trial Court then attributed to him a minimum wage level appropriate for an unskilled worker. The Learned Trial Court therefore applied two conflicting propositions and thus misdirected itself.

12. On the issue of dependency the evidence of the Plaintiff comprised oral testimony and the Chief's letter which listed the children and their ages which were 6 years, 15 years, 18 years, 21 years (married) and 19 years in addition to the children of the first widow. The Deceased lived in a semi-rural setting. In the circumstances it is unrealistic to assume a child who attains 18 years is immediately fully self-sufficient. The reality is more complex. With that in mind, in the circumstances of this case the $\frac{1}{3}$ ratio is not an appropriate ratio for dependency, both on the finding of the level of respective incomes and also the number and ages of the dependent children.

13. For the reasons aforesaid the award of the lower court set aside in the following respects:-

(1) The income of the Deceased

(2) The correct multiplier for dependency

(3) The failure to award any funeral expenses. In that respect the court is guided by *Kenya Breweries v Sao CA 144 of 1990*

14. The “Appellant prays that the Appeal be allowed in the following terms:

- (a) THAT the judgment and decree of the Subordinate court on dependency ratio be set aside.
- (b) THAT this Honourable Court do make its own findings on the dependency ratio.
- (c) THAT this Honourable Court do make an award on funeral expenses.
- (d) Costs of the Appeal.

15. Having considered the Grounds of Appeal, the Judgment of the Subordinate Court and the respective arguments of the Parties and for the reasons set out above, It is ordered that:

- 1. The Order of the Learned Trial Court is set aside in relation to (a) the income of the Deceased, (b) the appropriate multiplier, (c) the claim for loss of life expectancy under the Fatal Accidents Act and (d) nil award for funeral expenses.
- 2. The Deceased’s income as semi-skilled worker with a side business which has completely stopped is assessed at Kshs. 15,000/= per month.
- 3. The correct multiplier for the circumstances of this case is 2/3 in light of the number and ages of the dependents.
- 4. Reinstate the award of loss of life expectancy.
- 5. The Court assesses funeral expenses at Kshs. 50,000/=.
- 6. Appellants costs of the Appeal.

Order accordingly,

FARAH S.M. AMIN

JUDGE

DELIVERED, SIGNED AND DATED IN KAKAMEGA ON THIS THE 3RD DAY OF JUNE 2021 BY MEANS OF MS TEAMS PLATFORM

In the presence of:

Mr Abok for the Appellant

Ms Atieno for the Respondent

Court Assistant: Clement