



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO 96 OF 2018**

**HON. ATTORNEY GENERAL.....APPELLANT**

**VERSUS**

**SAVINAH FRANCIS** (*Suing as the personal representative of the estate of*)

**PETER MUSEE MUEMA.....1<sup>ST</sup> RESPONDENT**

*(consolidated with HCCA 95 of 2018 (for purposes of liability only)*)

**VERSUS**

**HON. ATTORNEY GENERAL.....APPELLANT**

**VERSUS**

**EMMACULATE MWONGELI** (*Suing as the Personal Representative of the estate of*)

**MAITHYA MUNYOKI.....2<sup>ND</sup> RESPONDENT**

*(Being Appeals from the Judgments of Hon. J. Munguti (PM) in the Senior Principal Magistrate's Court*

*at Kitui, Civil Cases No.s 69 & 70 of 2012 respectively, delivered on 24<sup>th</sup> October 2018)*

**JUDGMENT**

1. The Appellant (*Hon. Attorney General*) was the Defendant in the lower court where the 1<sup>st</sup> Respondent was sued for general and special damages arising from the death of one Peter Musee Muema who was the son to the 1<sup>st</sup> Respondent. The matter was heard and judgment entered in favor of the 1<sup>st</sup> Respondent in the sum of Kshs.2,525,000/= broken down as follows:

- Pain and suffering – Kshs.20,000/=
- Loss of expectation of life Kshs.100,000/=
- Loss of dependency Kshs.2,400,000/=
- Special damages – Kshs.15,000/=
- Total – Kshs.2,525,000/=

2. The Appellant was aggrieved and filed this appeal on the following grounds;

- a) *The learned trial Magistrate erred in both law and fact by holding the Appellant wholly liable against the weight of the evidence*

tendered.

b) *The learned trial Magistrate erred in both law and fact by ignoring the authorities cited in the Appellant's written submissions on the question of liability.*

c) *The learned trial Magistrate erred in both law and fact by failing to appreciate that the burden of proof was at all times upon the plaintiff.*

d) *The learned trial Magistrate erred in both law and fact by completely ignoring the Defendant's written submissions and all authorities cited whose copies were availed.*

e) *The learned trial Magistrate's award of general damages to the Respondent is so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered.*

3. The two appeals i.e. HCCA No. 95 and 96 of 2018 arose from the same accident. All the evidence and the submissions have been captured in the judgment in HCCA 95/2018. This court also consolidated the two appeals for purposes of determining liability only. The determination is that the Appellant's driver one Vincent Nzilu Mwikali (2<sup>nd</sup> Defendant in the lower court) was wholly to blame (at 100%) for the accident. This has been set out in the judgment in HCCA 95 of 2018.

4. Following that determination, I am only going to deal with the issue of quantum in respect to the 2<sup>nd</sup> Respondent's claim.

#### **Appellant's submissions on quantum**

5. Ms. Murugi reiterates the Appellant's submissions before the trial court *to wit*, adoption of a minimum wage of Kshs.6,999/= as the multiplicand and dependency ratio of 0. She contends that no evidence was adduced to prove that Muema was married and that the 2<sup>nd</sup> Respondent was his mother. She submits that a ratio of 1/3 would suffice if the court is inclined to hold that indeed the 2<sup>nd</sup> Respondent is Muema's mother.

6. She submits that the learned trial Magistrate did not cite an authority to support adoption of 2/3 as the dependency ratio.

#### **Respondent's submission on quantum in both HCCA No. 95 & 96/2018**

7. The Respondents submit that the Appellant has failed to show that the principles employed by the trial Magistrate, in arriving at the damages payable, were wrong in law or that the court in its discretion considered extraneous issues so as to make the award manifestly excessive.

8. They also submit that the Appeal is defective in form because the GK driver has not appealed yet he was the one who prompted the suing of the Appellant. He contends that the appeal is an academic exercise hence futile.

9. **Pw3** testified that Muema was her son and that he died at 12.00 midnight on the material day. She produced a copy of the death certificate as EXB9. She testified that Muema had 3 motor bikes doing boda boda business and would make at least Kshs.20,000/= per month. She stated said that Muema had a wife and 2 children who were still minors.

10. In cross examination, she said that Muema's shop was at Kasarani hospital but agreed that she did not have any documents to show the shop business. She also lacked documents to prove that Muema had 3 motor bikes and had no book to show his earnings. She said that she visited the chief to get a letter of the deceased's Dependants. She had no *m-pesa* records to show how the deceased used to help her.

#### **Awards under Law Reform Act**

11. The evidence of Pw3 was that Muema (*deceased*) died at midnight contrary to the learned Magistrate's finding that he died on the spot. The Appellant however has not contested the award for pain and suffering and loss of expectation of life. The awards made were in line with the Appellant's submissions in the trial court.

#### **Award under the Fatal Accidents Act**

12. With regard to the multiplicand, the pleadings and Pw3's evidence stated that Muema was a businessman making at least Kshs.20,000/= per month.

13. The learned trial Magistrate expressed himself as follows;

*"The deceased was a businessman according to evidence tendered. The defence said there was no proof but the court believed the account of Pw5 who said he knew the deceased's shop...I am persuaded to adopt..... an income of 10,000/=. Since there are no clear documents...."*

14. Indeed, Pw5 testified that Muema was a businessman operating a shop. My view however is that even though Muema was a businessman, there was no evidence that the court could safely rely on to approximate his monthly income.

15. It is trite that where earnings cannot be ascertained, courts should resort to the minimum wage. The Appellant proposed the minimum wage of a casual laborer (Kshs.6,999/=) as per the **Regulations of wages (General) (Amendment) Order, 2011**. This order however came into operation on 01/05/2011 and the deceased died on 02/04/2011. Accordingly, the applicable minimum wage is as provided in the **Regulations of wages (General) (Amendment) Order, 2010** which came into operation on 01/05/2010.

16. The deceased was a resident of Tungutu in Eastern Kenya. In my view, the category that suits him most is that of a shop assistant (6<sup>th</sup> row) under column 4 for 'all other areas' hence entitled to a minimum wage of Kshs.6,943/=.

17. With regard to the multiplier, the deceased was 29 years old and the trial Magistrate adopted a multiplier of 30 years. The Appellant submitted that the reasonable multiplier would have been 26 years.

18. I have looked at the trends in decided authorities and in **David Kimathi Kaburu –vs- Gerald Mwobobia Murungi (2014) eKLR** the court used a multiplier of 30 years for a deceased who died at the age of 28 years. In **Millicent Kimuli & Anor -vs- Mbisi Linah Catherine & Anor [2015] eKLR**; the court adopted a multiplier of 30 years for a deceased who died at the age of 30.

19. It is therefore my considered view that the multiplier used in the instant case is within an acceptable range.

20. As for the dependency ratio, the deceased's Dependants were pleaded as his mother, wife and two minor sons. I however note that this suit was instituted by Pw3 who testified that she was the deceased's mother. It is curious that the alleged wife did not participate in the proceedings at all. Neither a letter from the chief nor the minor's birth certificates were produced. In my view, the deceased should be treated as unmarried with his mother as the only Dependant. **Section 4(1) of the Fatal Accidents Act** acknowledges a parent as a Dependant.

21. From decided cases, it appears that our courts tend to lower the dependency ratio where the deceased is an unmarried child and the claimant, a parent. In **Mary Kerubo Mabuka –vs- Newton Mucheke Mburu & 3 others (2006) eKLR** the court used a dependency ratio of ½ for an unmarried lady. Similarly, in **Alice O. Alukwe –vs- Akamba Public Road Services Ltd (2013) eKLR** the court used a dependency ratio of ½ for an unmarried lady. Accordingly, the Appellant suggested 1/3. Going by the current trend, I will go by ½.

22. The award for loss of dependency should therefore work out as follows;  $6,943 \times 12 \times 30 \times 1/2 = 1,249,740/=$ .

23. The award on special damages was not contested and should therefore stand. Accordingly, the award should be as follows;

Pain & suffering.....Kshs.	10,000/=
Loss of expectation of life.....Kshs.	100,000/=
Loss of dependency.....Kshs	1,249,740/=
Special damages.....Kshs	<u>15,000/=</u>
<b>Total .....</b>	<b>Kshs. 1,374,740/=</b>

24. I therefore set aside the judgment by the lower court and substitute it with a judgment in favour of the 1<sup>st</sup> Respondent (*Savinah Francis*) the sum of Kshs.1,374,740/= plus costs and interest at court rates. The Appellant gets costs of the appeal.

Orders accordingly.

**Delivered, signed & dated this 7<sup>th</sup> day of May 2020, at Makeni High Court.**

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**H. I. Ong'udi**

**Judges**