



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 69 OF 2018**

**JOSEPHAT WAINAINA MWANGI..... APPELLANT**

**VERSUS**

**ESTHER JEMELI LEKEMET & JOYCE JEBET**

**(Suing as the legal representatives and administrators of the estate of the late)**

**DANIEL KIBIWOTT ROTICH (deceased).....RESPONDENTS**

***(Being an appeal from the Judgment and order of Hon. Barasa (PM) delivered on 21/03/2018 in Eldoret CMCC No. 286 of 2017 between Leah Virginia Chumba & Joyce Jebet (suing as the Legal representatives and administrators of the late Wilson Kipkemboi Yego (Deceased) vs. William Kiprotich.)***

**JUDGMENT**

1. The respondents **ESTHER JEMELI LEKEMET & JOYCE JEBET (Suing as the legal representatives and administrators of the estate of the late DANIEL KIBIWOTT ROTICH (deceased))** filed suit against **JOSEPHAT WAINAINA MWANGI** (Appellant) seeking *inter-alia*:-

- a) **General damages under the Fatal Accidents Act and the Law Reform Act.**
- b) **Special damages.**
- c) **Costs of suit and interest.**

The facts giving rise to the claim was as a result of a fatal road traffic accident that occurred on 18<sup>th</sup> April, 2015 involving the Appellant's motor vehicle registration No. **KCA 201 U TOYOTA HIACE MATATU** that when the Appellant, its agents, driver, servant, employee and/or assign while managing and/or drove the aforesaid motor vehicle so negligently, unduly, recklessly and carelessly that it caused an accident resulting in the deceased sustaining fatal injuries from which he died.

2. The Respondents *inter-alia* also sought for funeral, hospital and mortuary expenses and/or other special damages. The Respondents averred that the appellant, its agents, drivers, servants, employees and/or assigns were careless, reckless & negligent in unduly driving/controlling and/or managing the suit motor vehicle occasioning fatal injuries to the deceased which they wholly and solely hold the Appellant directly and/or vicariously liable for pain & suffering, the loss of earning/dependency, loss of life and special damages.

A consent judgment on liability was entered in favour of the respondents as against the appellant at **70:30%**

3. **ESTHER JEMELI (PW1)**, a sister to the deceased blamed the defendant/appellant as the driver and/or vicariously as the beneficial registered and/or otherwise owner of the suit motor vehicle registration No. **KCA 201 U TOYOTA HIACE MATATU** for driving the suit motor vehicle negligently, unduly, without due regard for the deceased and also carelessly that he caused the accident that the Deceased suffered fatal injuries. She told the trial court that the deceased who was a father of 5 children, was engaged in the business of selling charcoal from which he used to earn KShs 28,000/- per month. She produced birth certificates for the children, receipts amounting to KShs 64,700/- for special damages which included funeral expenses, records of official search for the suit motor vehicle and treatment chits, post mortem reports, death certificate, chief's letter and police abstract and post mortem report.

4. The Respondents directly and vicariously blamed the owner and/or driver of the suit motor vehicle for the occurrence of the said accident. They produced official search of the suit motor vehicles which proved that the Appellant was the beneficial, legal, lawful and/or registered owner of the suit motor vehicle. They also produced a P3 form and police abstract which confirmed the occurrence of the accident on the material day. The Police Officer (PW3) testified and confirmed the occurrence of the accident. He further stated that the deceased was rushed

to hospital but succumbed to the injuries.

5. The trial court made findings in favour of the Plaintiff as follows:

a) General Damages	Kshs. 10,000/=
b) Pain and Suffering	Kshs. 100, 000/=
c) Loss of expectancy	Kshs. 2, 160,000/=
d) Loss of Dependency plus Special damages	Kshs. 79, 542/=
e) Subtotal	Kshs. 2, 349, 542.00
Less 30% contribution	Kshs. 704, 862.60
Sub Total	Kshs. 1, 644, 679.40/=
f) Cost and Interest (by consent)	Kshs. 258, 464/=
<b>GRAND TOTAL</b>	<b>KSHS. 1, 903, 143/=</b>

6. The appellants being aggrieved by the outcome of the decision challenged the same on grounds that the quantum of damages awarded was high, and there was no reason for using a multiplicand of Kshs 15000/-, as there was even no proof that the deceased worked as a driver, other than that such information was entered was the death certificate. On account of this, the appellant argues that the trial court ought to have relied on the Regulation of Wages (General Amendment Order 2015) and use a basic minimum wage for the year 2015 as the multiplicand. In support of this argument, reference is made to the decision in **ESTHER NDEGE MWIRIGI & ANOR v PATRICK GITONGA MBAYA [2018] eKLR** where the court pointed out that the assessment of damages should not be based on assumptions and speculations, but on concrete evidence that is predictable. This court is urged to set aside the sum awarded and instead use a multiplicand of **Kshs. 5,844/-**, which will be fair, just and reasonable.

7. It is also the appellant's contention that the trial court did not consider the submissions made by the appellant's counsel.

8. The Respondents founded their claims on the **Law Reform Act** and the **Fatal Accidents Act** and pointed out that the manner of assessment of damages under the Fatal Accidents Act was **succinctly put in BEATRICE WANGUI THAIRU V HON. EZEKIEL BARNGETUNY & ANOTHER NAIROBI HCCC No. 1638 of 1988 (UR)** where Ringera J (as he then was) stated as follows:

*“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”*

9. The respondents maintain that they tendered evidence on record, that the deceased was a businessman who used to sell charcoal and made an approximately **Kshs. 28, 000/= (read Kenya Shillings Twenty-Eight Thousand only) per month**. In **JACOB AYIGA MARUJA & ANOTHER V SIMEON OBAYO, Civil Appeal No. 167 of 2002 [2005] eKLR** the Court of Appeal observed that: -

*“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”*

THAT in any event, the **Regulation of Wages (General) (Amendment) Order, 2018** provides for minimum wage for a general labourer at **Kenya Shillings Thirteen Thousand Five Hundred and Seventy-Two (Kshs. 13, 572.00)**. It is submitted that, the deceased was not a labourer but a business man who earned more than the prescribed minimum wage. The trial court has inherent discretion to adopt a **multiplicand based on the evidence proved before it. They point out that although they had submitted and pleaded with the trial court to adopt a multiplicand of Kenya Shillings Twenty-Eight Thousand (Kshs. 28,000/=)** which was the amount he earned from his business activities, yet adopted a multiplicand of **Kenya Shillings Fifteen Thousand (Kshs. 15,000/=)**. The respondents lament that the multiplicand proposed by the Appellant i.e. **Kshs. 5, 844/-** is extremely low and untenable for a person who was a successful businessman. This court is urged to dismiss the appeal with costs to the respondents.

That the jurisprudence emanating from the Court of Appeal have been consistent to the effect that an award of damages will not be disturbed unless it is inordinately high or low as to represent an entirely erroneous estimate, a position which was held in **BASHIR AHMED BUTT V UWAI AHMED KHAN [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms:

***“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”***

10. The respondent prays for a dismissal of the Appellant’s appeal with costs to the Respondent. Basically the issue for determination is simply whether the trial court erred in the multiplicand applied in assessing damages. The trial magistrate took into consideration the fact that the deceased was aged 36 years at the time of death, and was in good health and opined that he no doubt had a long life ahead of him. The trial court pointed out that although it was claimed that the deceased was a charcoal trader earning Kshs 28,000/- per month, there was no documentary proof to support the figure. The court chose to use the information contained in the death certificate that the deceased was a driver, and looked at past decisions to adopt the Kshs 15000/.

11. Whereas the sentiments expressed by the court of appeal in **JACOB AYIGA MARUJA & ANOTHER V SIMEON OBAYO, Civil Appeal No. 167 of 2002 [2005] eKLR** hold true, it also makes legal sense that in pegging a figure as a multiplicand, there must be a basis. One cannot just whimsically pluck a figure from the abacus and conclude that because the individual in a particular case was a driver and earned a certain figure, then that must be the standard earnings of every driver in Kenya. Further, it is not even clear who gave the information to the person who filled the death certificate to the effect that the deceased was a driver- which in any event contradicted what his sister told the trial court. I think the suggestion made by the appellant that the earnings of the deceased be aligned to the **Regulation of Wages (General) (Amendment) Order, 2015**, because that is predictable and has a legal basis as the deceased died in the year 2015, so the 2018 regulations do not apply.

12. Consequently, the appeal is merited and is allowed to the extent that the sum awarded as damages for loss of dependency is set aside as it was inordinately high, and arrived at based on the wrong principles. The same is substituted with the sum worked at **Kshs. 5844 x 18 x 12 x 2/3 = 561,024/-**

The awards under the other heads remain undisturbed. The costs of this appeal shall be borne by the respondents

**E-Delivered and dated this 5<sup>th</sup> Day of May 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**