



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 639 OF 2016**

**DORAH HELLEN AKINYI ALOO & CHARLES O.**

**OYAYA (Suing as the legal representatives of**

**the estate of JACK OPIYO GITAU-Deceased).....APPELLANTS**

**VERSUS**

**SIMON GAKAHU MURIMI.....1<sup>ST</sup> RESPONDENT**

**JOSEPHINE WAYIEGO.....2<sup>ND</sup> RESPONDENT**

**ZAVERCHAND PUNDA.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment and decree delivered by I. Gichobi (Mrs.) (Resident Magistrate) on 23<sup>rd</sup> September, 2016 in Milimani CMCC No. 6171 OF 2012)*

**JUDGEMENT**

1. Dorah Hellen Akinyi Aloo & Charles O. Oyaya, the appellants herein, filed a suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their capacity as the legal representatives of the estate of Jack Opiyo Gitau (“the deceased”) vide the plaint dated 9<sup>th</sup> October, 2012 and sought for both general damages under the Law Reform Act and the Fatal Accidents Act, and special damages in the amount of Kshs.12,700/ plus costs of the suit and interest thereon.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were sued in their capacity as the drivers and/or beneficial owners of motor vehicle registration number KAG 308B (“the subject motor vehicle”) while the 3<sup>rd</sup> defendant was sued as the registered owner of the subject motor vehicle.
3. The appellants pleaded in their plaint that sometime on or about the 19<sup>th</sup> day of October, 2009 while the deceased was travelling as a lawful passenger aboard the subject motor vehicle along Thika Road, the subject motor vehicle being carelessly driven lost control and was involved in a collision, leading to fatal injuries.
4. The appellant attributed the accident to negligence on the part of the respondents who was the driver, by setting out the particulars in his plaint.
5. It was also pleaded in the plaint that prior to his death, the deceased was a vigorous man aged 36 years who has left behind the following dependants:
  - a) Dora Hellen Akinyi Aloo      Widow
  - b) Mordecai Precious Jakopiyo      Son
6. Upon failure to enter appearance and/or file statements of defence, an interlocutory judgment was entered in favour of the appellants and against the respondents on 18<sup>th</sup> November, 2013.
7. At the formal hearing of the suit, the 1<sup>st</sup> appellant testified and upon close of her case, filed written submissions.
8. Eventually, the trial court delivered judgment in favour of the appellants and against the respondents jointly and severally as follows:

<b>Liability</b>	<b>100%</b>
<b>a) General damages</b>	
<b>Pain and suffering</b>	<b>Kshs.10,000/</b>
<b>Loss of expectation of life</b>	<b>Kshs.120,000/</b>
<b>Loss of dependency</b>	<b>NIL</b>
<b>b) Special damages</b>	
<b>TOTAL</b>	<b>Kshs.130,700/</b>

9. Being dissatisfied with the award of damages, the appellants have sought to challenge the same on appeal and have put forward the following grounds of appeal vide their memorandum of appeal dated 19<sup>th</sup> October, 2016:

- i. THAT the learned trial magistrate erred in law and in fact in awarding damages that were manifestly low as to amount to an abuse of discretion.*
- ii. THAT the learned trial magistrate misdirected herself on both law and fact in failing to award damages for loss of dependency.*
- iii. THAT the learned trial magistrate erred in law and in fact in failing to find that the appellant and child were dependants of the deceased.*
- iv. THAT the learned trial magistrate erred in law and in fact in failing to find that the appellant was both a personal representative of the estate of the deceased and a dependant.*
- v. THAT the learned trial magistrate erred in law and in fact in not taking into account the submissions of the appellant and evidence adduced.*
- vi. THAT the learned trial magistrate erred in law and in fact in not taking into account the appellant's documents submitted in evidence.*
- vii. THAT the learned trial magistrate erred in law and in fact in applying wrong principles in assessing damages.*
- viii. THAT the learned trial magistrate erred in law and in fact in totally ignoring the law put in by the appellant thereby arriving at a wrong decision on the issue of abatement of suits.*

10. This court directed the parties to file written submissions on the appeal. The record shows that the respondents neither appeared in the appeal nor filed written submissions.

11. On their part, the appellants have submitted *inter alia*, that the trial court erred in not awarding any damages under the head of loss of dependency despite evidence to show the deceased's occupation and earnings of Kshs.65,000/ every month.

12. The appellants have also faulted the trial court for failing to consider the testimony of the 1<sup>st</sup> appellant that she was married to the deceased and that they shared a son and hence a dependency ratio of 2/3 would have sufficed.

13. It is also the submission of the appellants that a multiplier of 24 years would be reasonable and that the award under this head be tabulated as follows:

$$\text{Kshs.65,000} \times 24 \times 12 \times 2/3 = \text{Kshs.1,280,000/}$$

14. The appellants cited various authorities, including the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** where the Court of Appeal held thus:

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”***

15. The appellants further cited the case of **Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR** in which the

court held that where a person's salary cannot be ascertained, reference may be made to the minimum wage regulations in order to determine his or her income for purposes of an award.

16. I have considered the appellant's written submissions on appeal and the authorities relied upon. Moreover, I have re-evaluated the evidence which the trial court had the opportunity to look at.

17. It is clear that the appeal lies against quantum, specifically the damages under the head of loss of dependency. I will therefore address the grounds of appeal raised contemporaneously under that head.

18. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** quoted by the respondent in his submissions:

a) *Where an irrelevant factor was taken into account.*

b) *Where a relevant factor was disregarded.*

c) *Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

19. At the trial, the 1<sup>st</sup> appellant testified that the deceased was her late husband and that she took out letters of administration at Kisumu High Court vide Succession Cause No. 496 of 2011, which she produced as an exhibit. The 1<sup>st</sup> appellant also produced the death certificate for the deceased as an exhibit.

20. It is the evidence of the 1<sup>st</sup> appellant that before his death, the deceased worked as a researcher in consulting firms and earning a salary of Kshs.100,000/ every month.

21. It is also her evidence that they had two (2) children though one (1) is deceased while the surviving child was at the time in class 5.

22. At the submissions stage, the appellant did not propose any amount under the head of loss of dependency.

23. In the end, the learned trial magistrate found that the appellants had not proved dependency and on this basis declined to award any damages under this head.

24. Upon perusal of the trial court's proceedings, it is noted that while the 1<sup>st</sup> appellant did not bring any evidence to prove that she was married to the deceased or that they shared a child, she was able to produce the death certificate in the name of the deceased. The 1<sup>st</sup> appellant also tendered the notice in the succession cause and the gazette notice to show that the grant of letters of administration were registered in her name and that of the 2<sup>nd</sup> appellant.

25. The testimony of the 1<sup>st</sup> appellant show that the deceased would support her and their child financially and even in the absence of documentary evidence to that effect, this court takes cognizance of the fact that many men support their families financially, irrespective of whether or not their wives are earning an income.

26. It is noteworthy that the above evidence was not controverted at the trial.

27. With respect, the learned trial magistrate fell into error when she opined that birth and marriage certificates or school documents constitute the only evidence that could have been relied upon to prove dependency in the instant case. The learned trial magistrate ought to have considered an award under this head. Having determined so, I will now determine a suitable sum to award.

28. On earnings, upon considering the pleadings and evidence, it is noted that it is pleaded that the deceased worked as a research officer before his death and this assertion is confirmed in the death certificate which was produced at the trial. There is no proof of earnings to guide this court on a suitable multiplier, though it is acknowledged that the deceased must have been earning some income.

29. The law is clear that documentary evidence is not the only means by which to establish earnings. This legal position was succinctly stated by the Court of Appeal in the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** cited by the appellant, thus:

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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...”***

30. Suffice it to say that the nature of the deceased's employment is not catered for under the minimum wage regulations so as to enable this court make reference to the regulations. In the absence of any guiding sums on proof of earnings for the deceased, I am of the view that the best approach would be to apply a global approach.

31. In the case of **Ann Kanja Kithinji (suing as the legal representative of the Estate of Patrick Koome (Deceased) & 2 others v Jacob Kirari & another [2018] eKLR** the court awarded a global sum of Kshs.800,000/ in the instance of a 36-year old deceased person who was a farmer.

