REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 57 OF 2020

HAWO SALAD KUTU T/A

GARBA QALLA FILLING STATION..... APPELLANT

VERSUS

CICILIA KIRINA (Suing as the Legal Representative

of the Estate of **PETER GITONGA**

MUGUMO- DECEASED).....RESPONDENT

(Being an appeal from the Judgment and decree the Hon C. Obara PM made on 24/4/2020 in Maua

CMCC No. 17 of 2019]

J U D G M E N T

1. The appellant was the defendant before the trial court while the respondent was the plaintiff. The respondent instituted the proceedings in the trial court vide a plaint dated 13/2/2019 and amended on 29/4/2019. She blamed the appellant for an accident that occurred on 10/2/2017 along Maua-Kiengu Road whereby her husband **Peter Gitonga Mugumo** perished.

2. She therefore sought damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***, damages for loss of companionship, the costs of the suit and interest.

3. Liability was determined in **Maua CMCC No. 16 of 2019** wherein the appellant was held 100% liable. The main issue for determination was therefore quantum. The trial court arrived at the following determination: -

a) Pain and Suffering - Kshs. 50, 000/=

b) Loss of expectation of Life - Kshs. 100,000/=

c) Loss of dependency - Kshs. 2,016,000/=

d) Special damages - Kshs. 140,000/=

Total Kshs. 2,306,000/=

4. Aggrieved by that decision, the appellant filed its memorandum of appeal citing three grounds of

appeal, namely, that: -

> **(i) The Learned Principal Magistrate erred in law and fact in the manner she apportioned quantum especially under the head of loss of dependency by awarding the Respondent a figure of Kshs. 6,000/= as earnings from businesses when the same was not proved.**
>
> **(ii) The learned Principal Magistrate exhibited open bias in favour of the Respondent in the manner she assessed quantum under the head of loss of dependency by speculating about the deceased's earnings from unknown businesses when she was not substantiated or proved.**
>
> **(iii) The learned Magistrate misdirected herself into using wrong principles in the assessment of quantum payable to the Respondent.**

5. The appellant submitted that the trial court erred in applying a Multiplicand of Kshs. 12,000/= whereas the provable income was only Kshs. 6,000/=. That the respondent did not present any documentation to show the deceased earned the extra Kshs. 6,000/= alluded to by the trial court. The appellant relied on **Ann Kanja Kithinji & 2 others v Jacob Kirari & Another [2018] eklr, Chania Shuttle v Mary Mumbi [2017] Eklr,** in support of his submissions.

6. On her part, the respondent submitted that the trial court did not rely on wrong principles of law when arriving at the multiplicand of Kshs. 12,000/=. That the same was arrived at from the evidence before court which showed that the deceased was doing side jobs which earned him an extra income of Kshs 6000 per month. It was her submission that were it to have been in the alternative, the trial court should have taken into account the minimum wage offered for a caretaker as per the ***Regulation of Wages (General) (Amendment) Order 2018*** which is currently Kshs. 24,485/=.

7. She further submitted that the trial court ought to have considered the provisions of the ***International Convention on Part Time Work No. 175 of 1994***. The cases of **Njuguna Mwaura v Builders Den Limited & Another [2014] eklr, Kamau & 2 Ohers v Mugamangi [2004] eklr** and **Kennedy Nyangoya v Bash Hauliers [2016] eklr,** in support of those submissions.

8. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and come to its own independent findings and conclusions. See **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123.**

9. At the trial only the respondent who testified. She told the court that the deceased was her husband with whom she had 5 children and was aged 39 years at the time of his demise. That he was a business person owning a shop and conducting hawking at Kiengo Market. He was also a part-time employee at Deliverance Church, Kiengo. He used to earn Kshs. 50,000/= from his business and Kshs. 6,000/= from the Church.

10. The grounds of appeal raise one substantive issue; whether the trial court erred in adopting Kshs. 12,000/= as a multiplicand. It is an appeal on quantum. The principles applicable are well known as were set out in the case of **Butt v. Khan [1978] eKLR.** That the appellate court is not to interfere with the exercise of the trial court's discretion unless the same is inordinately high or low as to be a wrong estimation of damages or the trial court considered an irrelevant issue or failed to consider a relevant issue.

11. In determining the multiplicand, the trial court held as follows: -

> ***"… Nevertheless, since the defendant did not challenge the fact that the deceased was employed on a part time basis by the church, it can be reasonably assumed that during the rest of the days when he was not working at the church, he engaged himself in other meaningful activities like doing business as testified by the plaintiff. He had a wife and five children who depended on him. The amount of Kshs 6,000/= he earned from the church, could not have sustained his family going by the school fees structures and payment receipts produced as Exhibit 10. For***

example, the fees structure dated 25/10/2018 from Ntuene Secondary School indicated the fees for 1st term as Kshs 17,500, 2nd term Kshs. 10,000/=, and 3rd term Kshs 6,900/=. That is the fees for only one child.

In the circumstances and doing the best I can, considering that the deceased left behind a wife and five children, I will assess earnings from the business alluded to by the plaintiff. She stated that the deceased used to sell and hawk items like cooking pans to supplement what he used to earn from the church. I believe that the said business was not earning him enough and that is why he had taken a part time job in the church. Doing the best I can in the circumstances, I assess the earnings from the said business at a reasonable figure of Kshs. 6,000/=. I will therefore adopt a multiplicand of Kshs. 12,000/= …"

12. In **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] Eklr,** the Court of Appeal held: -

"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."

13. In **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] Eklr,** the Court aligned itself with the decision of the Court of Appeal in **Joseph Ayiga Maruja** ***(supra)*** and opined thus: -

"Whilst this court was of the view that the Respondents could have done better by adducing some sort of documentary evidence of the deceased's income, it could not begrudge them for not adducing the same in evidence due to the informal nature of the business the deceased was engaged in. However, she could have at least attempted to provide some sort of proof that the deceased would send her a sum of Kshs 5,000/= and her Co-wife a sum of Kshs 3,000/= for their monthly sustenance to demonstrate their dependency on the deceased.

Be that as it may, this court was prepared to accept her evidence that the deceased who was aged thirty six (36) years was engaged in some sort of economic activity to support the Respondents, his Co-wife and mother.

Accordingly, bearing in mind the aforesaid case law on the question of income that is not proven by documentary evidence and the inflationary trends over the years, this court was not persuaded to interfere with the Learned Trial Magistrate's finding regarding the deceased's income and retained the same at Kshs 10,000/= as it was a modest figure by all standards".

14. The Court in ***Pleasant View School Limited (supra)*** also cited the case of **Authur Nyamwate Omutondi & Others V United Millers Limited & 2 Others [2009] eKLR**, Mwera J (as he then was) stated as follows:-

"… It is clear that the claim that the deceased was a businesswoman at the time of her death was not established. She had a trading licence up to 31st December 2002. She did not renew it in 2003 when she died. Thus Sarah cannot be presumed to have been a fish monger in 2003 as the plaintiff set out to prove. Further, it was not proved by accounts or other means that Sarah earned Kshs. 100,000/=. A transfer bank slip for Kshs. 60,000/=, could not be proof of income. Proof of income is basic to a claim of loss of dependency under the Fatal Accidents Act because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved, then no award of dependency can issue. However, in our present case this court is prepared to take a minimum sum of Kshs. 4,000/= as what Sarah could earn in rural Migori to support herself and the nephew (PW1). With a multiplier of

eight (8) the court awards him Kshs. 256,000/= …"

15. From the foregoing decisions, it is clear that courts in this country are alive to the fact that Kenyans may not be as meticulous as those in the west in keeping records. That most Kenyans in the informal sector do small time businesses or economic activities from which they eke a living. It is from such activities that they are able to live on and sustain their families.

16. In view of the foregoing, it would be absurd to hold that the estate of an adult Kenyan with a family should be held to have lost no income just because there is no documentary evidence to prove such income. Of course if such victim was in employment, it behoves the claimant to prove the income as the employer would be having such evidence.

17. In the present case, there is no dispute that the deceased was in a part-time engagement with the Kiengo deliverance Church earning Kshs.6,000/- per month. The respondent testified that the deceased had a business and was hawking items at Kiengo Market when not working for the Church. Such informal set up is difficult to expect the deceased to have kept any accounts.

18. The trial court believed that the deceased had a side economic activity apart from the Church engagement. The trial court cannot be faulted for that. There was clear evidence of that fact through the testimony of the respondent which remained unshaken.

19. In view of the foregoing, a court cannot toss out a claimant without a relief. The court can either give a global award or estimate a reasonable and modest figure as a guide. In the cases mentioned above, the courts gave figures ranging from Kshs. 4,000/- to Kshs. 10,000/- as a guide.

20. That being the case, I am satisfied that in pegging the deceased's additional income at Kshs. 6,000/- per month, the trial court did not err. The court did not apply any wrong principles neither did it consider any irrelevant matter.

21. In this regard I find the appeal to be without merit and the same is dismissed with costs to the respondent.

SIGNED at Nairobi.

A. MABEYA, FCIArb

JUDGE

DATED and DELIVERED at Meru this 10th day of December, 2020.

JUDGE