



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.1 OF 2017**

**MOHAMMED ABDI ALI.....APPELLANT**

**VERSUS**

**PAUL MUTURI MWANGI..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. J. Onyiego-CM in Nyeri CMCC No.271 of 2014 of 16<sup>th</sup> December 2016.)*

**JUDGMENT**

The parties herein recorded a consent on liability at 30:70. The appeal is therefore only on General damages. From the appellants submission the trial court's award was excessive having adopted a multiplier of Kshs.15000/- instead of the appellant's proposal of Kshs.5000/- a multiplier of 30 years instead of 20, loss of expectation of life at Kshs.150,000/- instead of Kshs.60,000/- proposed by appellant, pain and suffering at Kshs.20,000/- instead of Kshs.10,000/-.

The appellant relied on **Sheikh Mustaq Hassan vs.Nathan Mwangi Kamau & Others CMCC NO.743/1981.**

The cause of action arose out of a Road Traffic Accident that occurred on 5<sup>th</sup> September 2013 at 3:10pm when the deceased was knocked down by motor vehicle Reg.No.KBN 979 M Toyota pick up. He was 18 years old, a student at Gachika Polytechnic Training in Electrical Engineering. He was in good health, with good prospects in life- his estate suffered loss and damage, and his father and siblings lost future dependency in him.

The deceased's father testified that he had lost a son, whom he had hoped would support him after he had completed school. He said he was rang at about 5:00pm on the material date that his son had been involved in an Road Traffic Accident and was in hospital. he went to school the following day only to find that he had died.

After that parties exchanged documents and closed each their respective cases. They agreed to file submissions. in a brief judgment the learned magistrate noted stated that he had considered the authorities cited by both parties.

It is trite that an appellate court will not interfere with an award for damages as the assessment of damages is the exercise of discretion by the trial court.

The appellate court can only do so for good reason- where the trial court has acted on a wrong principle of the law, or misapprehended the facts or made a wholly erroneous estimate of the damage suffered. See **The Administrator, HH The Aga Khan Platinum Jubilee Hospital Vs.Munyambu (1985)eKLR** –Kneller JA. Similarly in **Salim S.Zain & Another vs.Rose Mulee Mulwa (1997)eKLR** where the Court of Appeal reiterated the same.

***“The appeal court must be satisfied that either the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so in ordinarily high it must be a wholly erroneous estimate of the damages”***

The appellant is merely complaining that the awards were too high and contrary to the authorities cited to the trial magistrate.

Looking at the submissions before the subordinate court, on loss of earnings the defendant relied on **Sheikh Mustag Hassan (1986) eKLR** where the deceased died at 17 years old. The court allowed a multiplier of 18 years. The defendant proposed 20 years. The plaintiff proposed 30 years.

In the **Sheikh Mustaq case** the court considered the salary the deceased would have earned for the course he had desired to undertake.

In this case the deceased was already in a college undertaking a course in Electrical Engineering. The learned magistrate assessed the

expected income at Kshs.15000/- per month.

The respondent in their submissions sought an income of Kshs. 12,000/-. The appellant had submitted for Kshs.5000/-. It is therefore not clear how the learned magistrate came to the figure of Kshs.15000/- giving the respondent what they had not even asked for. I would therefore allow just what was sought by the plaintiff in their submissions at Kshs.12000/- per month.

The multiplier of 30 years was clearly supported by other authorities cited to the magistrate. Taking into consideration that the deceased would probably have had other dependents save for his parents and siblings I would not disturb the dependency ration of 1/3 applied by the learned magistrate = $12000 \times 12 \times 30 \times \frac{1}{3} \times 70\%$

The award of Kshs.150, 000/-for loss of expectation of life was not supported by the submissions by the parties. In their submissions the plaintiff did not mention it. The defendant proposed Kshs. 60,000/-. The learned magistrate laid no basis for awarding Ksh.150,000. I would therefore allow the award of Kshs.60,000/-as it was not challenged by the plaintiff.

On pain and suffering the sum of Kshs. 20,000/- is reasonable in the circumstances.

I would therefore allow the appeal to the extent that; -

- 1) Loss of Expectation of life – Kshs.60,000/-
- 2) Lost years –  $30 \times 12 \times 12000 \times \frac{1}{3}$
- 3) Pain and suffering –Kshs.20,000/-

The applied to the consent on liability at 70:30

Plus, costs and interest from the date of judgment in the lower court.

However, taking into consideration that the appellant did not file the decree with the appeal as required by Section 79G of the CPA and going by the authority of **Kyuma Vs.Kyema (1988) KLR 185**, and the persuasive authority of **Ndegwa Kamau T/A Sideview Garage vs. Fredrick Isika Kalumbo (2016)eKLR** the omission to file the decree appealed from is fatal and the appeal must fail.

Appeal is dismissed with costs.

**Dated delivered and signed this 1<sup>st</sup> March 2019 at Nyeri.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant: Juliet

Ms. Wambui Mwai holding brief for Wagiita Theuri for respondent

N/A for Kariuki for appellant.

**Mumbua T Matheka**

**Judge**