



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 127 OF 2016**

**MASHUA HASSAN MSUKA**

**(Suing as the administrator of the**

**estate of the late JUMA MOHAMED MAJEPO)....APPELLANT**

**VERSUS**

**1. JOHN MIGWI.....1<sup>ST</sup> RESPONDENT**

**2. ERIC MUCHANGLI.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against part of the Judgment**

**delivered on the 31<sup>st</sup> August, 2016 by Hon. C. M. Maundu,**

**Senior Principal Magistrate in Kwale SPMCC No. 72 of 2014)**

**MASHUA HASSAN MSUKA**

**(Suing as the administrator of the**

**estate of the late JUMA MOHAMED MAJEPO).....PLAINTIFF**

**VERSUS**

**1. JOHN MIGWI.....1<sup>ST</sup> DEFENDANT**

**2. ERIC MUCHANGLI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The appellant herein was the plaintiff in the lower court. He filed a suit in the said court on 9th April, 2014 seeking general and special damages resulting from the death of Juma Mohamed Majepo who died in a road traffic accident allegedly caused by the 2nd defendant/2nd respondent who was the authorized Driver, servant and/or agent of the 1st defendant/1<sup>st</sup> respondent. The Honourable Magistrate entered Judgment in favour of the appellant as against the respondents in the sum of Kshs. 420,661.40. The appellant being aggrieved by the said Judgment filed a memorandum of appeal on 2<sup>nd</sup> September, 2016 raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact in awarding damages of Kshs. 315,826.80 under the head of loss of dependency which award was manifestly low as to amount to a wrong estimate;

(ii) That the Learned Trial Magistrate erred in law and fact in finding and adopting an excessively low multiplicand of Kshs. 5,263.78 in the assessment of damages under the head of loss of dependency contrary to the evidence of earnings adduced thereby making an award that was so low in the circumstances as to amount to an injustice;

(iii) That the Learned Trial Magistrate erred in law and fact in basing the multiplier on the age of the deceased's mother thereby adopting a multiplier of fifteen (15) years which was an extremely low multiplier bearing in mind the deceased was a healthy young man aged 22 years, which finding is contrary and out of keeping with the evidence and other findings in similar circumstances thus arriving at an award that was so low in the circumstances as to amount to a miscarriage of justice;

(iv) That the Learned Trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in completely disregarding the plaintiff's submissions and authorities on damages awarded under loss of dependency thereby exempting himself from arriving at a decision based on merit; and

(v) That the said assessment and award of damages under the head of loss of dependency is out of keeping with other Kenyan awards for comparable/similar fatal claims and has no proper basis for it.

2. The appellant therefore prays for the following orders:-

(i) That the appeal herein be allowed, the Judgment of the trial Magistrate Honourable M. Maundu in Kwale S.P.C.C No. 72 of 2014 dated 31<sup>st</sup> August, 2016 as far as damages under loss of dependency is concerned, be set aside and the costs of this appeal be borne by the respondents.

(ii) The Honourable court be pleased to assess damages under the head of loss of dependency afresh.

(iii) Such other orders and relief that this Honourable court may deem fit to grant.

3. In her submissions, Ms Wanjeri, Learned Counsel for the appellant submitted that the appeal is on quantum of damages on loss of dependency. She stated that the deceased was 22 years old and was earning Kshs. 10,000/= . He would give Kshs. 3,000/= to his mother per month. Counsel for the appellant argued that the said evidence is uncontroverted. She further submitted that the lower court adopted the sum proposed by the respondent as a monthly pay at the sum of Kshs. 5,268.78 and applied a multiplier of 15 years. Counsel stated that the court decided to award the minimum wage as there was no documentary evidence on proof of earnings. She stated that on her part she did not ask the lower court to apply the minimum wage but to make a comparison between the minimum wage in the year 2012 and the amount of money the deceased was making monthly.

4. She argued that the court should take into account the circumstances surrounding a particular jurisdiction in making an award as in her view, the minimum wage of a worker in Kwale, a leading tourist destination cannot be the same as for a worker in Turkana. She stated the foregoing factors were applied in Naivasha High Court Civil Appeal No. 44 of 2015, **Kenya Pipeline Company Ltd. vs Njoki Njuru**.

5. It was submitted that the deceased's age as well as that of his dependant ought to have been considered but the Hon. Magistrate only took into account the dependant's age to arrive at the multiplier. She indicated that the Honourable Magistrate in awarding damages failed to exercise his discretion judicially as the award of Kshs. 315,826.80 for loss of dependency was grossly low. She stated that the reason given by the Magistrate was that there was no proof of earnings.

6. Ms. Wanjeri urged the court to interfere with the said award and apply a global sum. She relied on the case of **Mwanzia vs Ngalali Mutua Services Mombasa Ltd and Another**, Nakuru High Court Civil Appeal No. 15 of 2003. She invited the court to consider the authorities cited in her written submissions. She prayed for the appeal to be allowed.

7. Mr. Jengo, Learned Counsel for the respondent opposed the appeal and stated that the appellant in the lower court introduced the element of the minimum wage. He argued that since the deceased was based in Kwale, the minimum wage for the area, at his time of death was Kshs. 4,577.20 plus 15% house allowance per month. Counsel for the respondent stated that the Hon. Magistrate considered the minimum wage based on the figures contained in Legal Notice No. 71 of 2<sup>nd</sup> July, 2012. He stated that Counsel for the appellant gave a proposal for an award of loss of dependency at Kshs. 10,000x12x40x1/3=Kshs. 1,600,000/=. It was argued that this court can only interfere with the award made by the lower court as per the principles laid out in **Henry Hidaya Ilanga vs Manyema Manyora** [1961] EA 705. He contended that the court was not told of the principles that the Hon. Magistrate did not consider.

8. In reference to the evidence of the deceased's mother, Mr. Jengo submitted that she testified that the deceased was a casual labourer who was on and off work, hence the lower court had to exercise its discretion in the manner it did by applying the minimum wage. Counsel for the respondent cited the case of **General Motors East Africa Ltd. vs Eunice Alila Ndeswa and Sofia Musambai Indasi and Another**, HCCA No. 527 of 2013. He further stated that it was not shown that the deceased used to pay rent, water, electricity or pay for any social welfare and therefore the court cannot be faulted for not taking into consideration issues that were not brought before it in evidence.

9. He submitted that the issue of the multiplier used is a matter of fact and courts have set principles in determining the use of multipliers. He referred to the case of **Leonard O. Wekesa and Another vs Major K. Birgen**, HCCCA No. 22 of 2013 that states that a multiplier must have a bearing on the wife and the children of the deceased. He further stated that the only dependent herein was the deceased's mother who was 57 years old and that the trial court was right in considering the deceased's mother's age. In his view, a lump sum figure is not a correct award as figures are picked from the blues. He argued that in a case where someone has died, the court has to consider variances and circumstances surrounding each case. He cited the case of **Philip Kiplimo Tuwei vs Elkana Kipserem Ng'etich** (suing as legal administrator of the estate of Esther Jeptoo (deceased), Eldoret HCCA No. 73 of 2009, where the court applied the regulation of wages (General Amendment Order ) 2005.

10. In response to Mr. Jengo's submissions, Ms. Wanjeri submitted that in the Judgment of the lower court, the Hon. Magistrate only considered the age of the dependant but not the deceased as well. She argued that the court should have given a global award as it did not adopt the evidence that the deceased was earning Kshs.10,000/= per month. It was argued that the lack of documentation did not mean that an award cannot be made. She urged the court to consider the evidence adduced in the lower court which was uncontroverted and award a

global sum, which courts have said would do more justice than using the multiplier approach.

## ANALYSIS AND DETERMINATION

The issue for determination is if this court should interfere with the award for loss of dependency.

11. The duty of the first appellate court was enunciated in the case of **Sumari and Another vs Allied Industrial Limited** [2007] 2 KLR 1, as follows:-

***“Being a first appeal, this court is obliged to reconsider the evidence, re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless:***

***(a) It was based on no evidence; or***

***(b) It was based on a misapprehension of the evidence; or***

***(c) The judge was shown demonstrably to have acted on the wrong principle in reaching the finding he did.”***

12. PW1, Mashua Hassan Msuka testified that she filed the suit on behalf of her deceased son, Juma Mohammed Majepo. She obtained a grant of letters of administration which she produced as plf exh. 1. She stated that she sued the respondents for causing the accident which killed her son. It was her evidence that on 25<sup>th</sup> August, 2012 at 1:30a.m., while at home, she was told that the deceased had been hit by a motor vehicle and had died on the spot. She saw the deceased the following day. She produced a copy of the death certificate as plf. exh. 2. She gave the registration No. of the motor vehicle that caused the accident as KBP 976G. A search done by her Advocate revealed that John (1st respondent) was the owner of the motor vehicle. She produced a copy of the records of ownership of the said motor vehicle as plf. exh. 3 and a receipt thereof as plf. exh 4. She informed the lower court that the Chief wrote a letter confirming that she was the deceased’s mother, it was produced as plf. exh. 5. She was issued with a police abstract when she reported the accident at Diani Police Station. She indicated that the said police abstract had been produced as plf. exh. 7 in case No. 49 of 2014. She further testified that Eric (2nd respondent) was charged with a traffic offence. She testified that she spent about Kshs. 20,000/= on the deceased’s burial.

13. It was the evidence of PW1, as tendered before the lower court that the deceased used to do casual jobs and worked at Amani Beach (Hotel) at the time of his death, where he used to earn Kshs. 300/= per day. He would be paid after about 2 weeks and would assist her with Kshs. 3,000/= monthly. She stated that the deceased was 22 years old, single and with no health problems. She indicated that since his death she does not get financial assistance anymore. She testified that her Advocate wrote a demand letter (to the respondents) which she produced as plf. exh. 6. She paid her Advocate Kshs. 25,000/= to obtain a grant (of letters of administration). She produced a receipt thereof as plf. exh. 7. She prayed for compensation for the loss of her deceased son.

14. On cross-examination, she stated that the deceased used to work as a shamba boy and it was not a constant job as he was on and off work, such that when he was not at work, she got no money from him.

15. Mr. Jengo submitted that the Counsel for the appellant is the one who limited the Hon. Magistrate through her submissions by making reference to the minimum wage guidelines and that she made no submissions on a lump sum award being made.

16. This court notes that the Hon. Magistrate had the leeway to consider the submissions made and arrive at his own decision. He was not bound by the submissions made before him as he was duty bound to do justice to the parties. It is my finding that had the Hon. Magistrate considered all the facts before him and the applicable principles in a claim under the Fatal Accidents Act and the Law Reform Act, he would have arrived at a different finding.

17. The Judgment delivered by the lower is quite clear that the Hon. Magistrate in arriving at the award for loss of dependency only considered the age of the deceased’s mother. He did not pay due regard to the age of the deceased which was a material factor that should have been considered. In so doing, the Hon. Magistrate misdirected himself and arrived at an award that was manifestly low.

18. In **Mwanzia vs Ngalali Mutua Services Mombasa Ltd and Another (supra)**, Meoli J., aptly captured the issue a deceased’s earnings by stating as follows:-

***“The quantification of the income of a deceased person in a case where no formal documentation exists will always pose a challenge. The court cannot merely abdicate its duty in such circumstances, but must do what is just and reasonable based on the available evidence. Hence in such cases, assessment cannot be scientific or strictly mathematical exercise, but a mix of relevant factors including the evidence before the court and a bit of the judging skills of the trial magistrate, the latter which is inevitably shaped by her experiences and understanding of the locality in which the court is based.”***

19. In **Jacob Ayiga Maruja and Another vs Simeone Obayo**, Civil Appeal No. 167 of 2002 [2005] eKLR, the Court of Appeal observed as follows:-

***“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.”***

20. In **DMM** (suing as the administrator and legal representative of the estate of LKM) **vs Stephen Johana Njue and Another** [2016], Gikonyo J., awarded a global sum of Ksh. 1,200,000/= for loss of dependency and set aside an award of Kshs. 700,000/= for a 16 year old child after noting that the Hon. Magistrate therein failed to take into account the age of the deceased.

21. In the case of **Oyugi Judith and Another vs Fredrick Odhiambo Ongong and 3 Others** [2014] eKLR, Majanja J., when considering a case where the appellants did not produce any documents as prove of earnings awarded a lump sum of Kshs. 700,000/= for the appellants who were aged 28 years and 30 years, after he found that the amounts which were proposed as their monthly earnings were speculative.

22. I have considered the rival submissions made by both Counsel and the authorities cited to support their arguments. I have also considered the decisions I have referred to in this Judgment. In this case, the earnings of the deceased were unascertained by documentary evidence and the Hon. Magistrate did not take the age of the deceased into account. The deceased was a 22 year old man who was in good health. He was making an honest living and would give part of his earnings to his mother for her upkeep. Taking the foregoing factors into consideration, I am inclined to interfere with the award for loss of dependency that was made by the lower court. I hereby set aside the said award and substitute it with a global award in the sum of Kshs. 900,000/=. The other awards remain the same. The gross award therefore works out as:-

Pain and suffering	Kshs. 20,000
Loss of expectation of life	Kshs. 150,000
Loss of dependency	Kshs. 900,000
Special damages	Kshs. 40,000
<b>Total</b>	<b>Kshs. 1,110,000</b>
Less 20 % contribution	Kshs. 222,000
<b>Net award</b>	<b>Kshs. 888,000/=</b>

23. The appeal is allowed to the above extent. The costs of the appeal and the lower court case are awarded to the appellant. Interest is also awarded to the appellant at court rates.

**DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of May, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the appellant

Mr. V. Otieno holding brief for Mr. Jengo for the respondent

Mr. Oliver Musundi - Court Assistant