



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 11 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

MARTIN MAITIMA M'AMATHI.....APPELLANT

AND

SIMON NJOROGE NJUGUNA.....1ST RESPONDENT

CATHERINE MUKAMI suing as the legal representative

and administrator of the estate of FRANCIS

NJUGUNA NJOROGE (DECEASED).....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Karanja, PM

dated 19th February 2016 at the Chief Magistrates Court

at Meru in Civil Case No. 316 of 2014)

JUDGMENT

1. The deceased died following a road accident that took place on 9th April 2014 along the Meru-Isiolo Road. She was a passenger in motor vehicle registration number KBT 300X which was owned and driven by the appellant. Following her death, the deceased's personal representative and dependants claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The issue of liability was settled by a consent in the ratio of 90:10 in the respondents' favour. Upon assessment of damages, the trial court made the following award;

Pain and Suffering	Kshs. 100,000/-
Loss of expectation of life	Kshs. 150,000/-
Loss of dependancy	Kshs. 3,120,000/-
Special damages	Kshs. 150,000/-
Total	Kshs. 3,520,000/-

2. Counsel for the appellant submitted that the only issue in this appeal is that the trial magistrate erred in adopting a multiplicand of Kshs. 20,000/- without any basis for settling on that figure and thereby arrived at an award that was inordinately excessive in respect of damages for loss of dependancy. Counsel for the respondent, opposed the appeal and supported the decision of the trial magistrate on the ground that it was based on the pleading and evidence before the court

3. Before reaching a decision one way or the other, since I am exercising the jurisdiction of the first appellate jurisdiction, it is my duty to re-

evaluate and re-assess the evidence adduced before the trial court keeping in mind that it is the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see **Selle v Associated Motor Boat Co. [1968] EA 123**).

4. The testimony of the deceased's father, Simon Njoroge Njuguna (PW 1) was that the deceased was working at Njuguna Hardware in Isiolo. He told the court that the deceased was earning about Kshs. 200,000/- per month and to support this, he produced a bank statement from Consolidated Bank for Njuguna Hardware Isiolo for the period 2nd January 2014 to 31st March 2014. In cross-examination, PW 1 admitted that he was running the hardware shop and that the son was working under him as it was a family business. In re-examination, he told the court that each of them had a separate business and although they used one bank the statement produced belonged to the deceased.

5. Based on the evidence, counsel for the trial court submitted that a multiplicand of at least Kshs. 200,000/- was reasonable in the circumstances. Counsel for the appellant submitted that the evidence pointed to the fact that the business was solely operated by PW 1 who opened it 10 years prior to the deceased's death. He pointed out that the death certificate, which was produced in evidence, showed that the deceased's occupation was in ICT. The appellant further contended that the deceased had no source of income as the respondents failed to produce any evidence to show that the deceased was connected to the business. The appellant proposed Kshs. 5,000/- which is the applicable minimum wage.

6. In evaluating the evidence, the trial magistrate found that it was more probable that not that the deceased worked in the same business as his father and the amounts set out in the bank statement could not have been said to have been earned solely by the deceased or available to him for his own use. He therefore concluded that the deceased's net income was Kshs. 20,000/-.

7. The multiplicand is the net income of the deceased and it is a question of fact. In addition, the Court of Appeal has established in **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR** that it would be wrong to insist on documentary evidence in every case to show or prove that earnings of the deceased.

8. What is clear from the testimony of the PW 1 is that his son was working in the business with him. I do not find or see any evidence of a separate business, a fact which would have been established by further evidence within the knowledge of PW 1. I have looked at the statement and it does not necessarily show the income of the deceased. It is a statement of account for the business and one cannot extrapolate from it the deceased's income. Although, the appellant submitted that the deceased could have been working in ICT as evidenced by the death certificate, this is not inconsistent with working in a hardware shop. Such work would involve use of ICT in sales, taking inventory and stock or accounts. I therefore find and hold that the deceased was working with his father in the family business and earning some money with he would assist his family. PW 1 testified that the deceased would assist them with at least Kshs. 20,000/- monthly depending on his ability.

9. As to the multiplicand of Kshs. 20,000/-, I have also looked at the evidence of Catherine Mukami (PW 2), the deceased's wife who adopted her statement which states that the deceased would assist them with at least Kshs. 20,000/- per month and the statement of PW 1's wife, Lydia Wanjiku Njoroge (PW 3) who stated that he would assist them with at least Kshs. 20,000/- a month. These statements were not challenged at all. The totality of the evidence is that I cannot say that the trial magistrate erred in settling to settle to a figure of Kshs. 20,000/- per month as a multiplicand as it is clear that the deceased was earning some income with which he supported the family.

10. The general principle upon which this Court, as an appellate court, will interfere with an award of damages was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

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

11. Having found that there was no error in determining the multiplicand, I dismiss that appeal with costs to the respondents which I assess at **Kshs. 40,000/-**.

DATED and DELIVERED at MERU this 6th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Kariuki instructed by Mithega & Kariuki Advocates for the appellant.

Mr Mbaabu instructed by Carlpeters Mbaabu and Company Advocates for the respondents.