



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 31 OF 2017**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**PAUL KIRIMI KITHINJI.....1<sup>ST</sup> APPELLANT**

**ESTON MWIRIGI NDEGE.....2<sup>ND</sup> APPELLANT**

**AND**

**JUSTUS MUTEMBEI MUCHIRI & KELVIN MAWIRA JUSTUS**

**suing as the legal representatives and administrators of the estate of**

**CATHERINE KIENDE DAVID.....RESPONDENTS**

***(Being an appeal from the Judgment and Decree of Hon. C.A. Abuya, SPM***

***dated 20<sup>th</sup> March 2017 at the Chief Magistrates Court at Meru***

***in Civil Case No.272 of 2015)***

**JUDGMENT**

1. According to the memorandum of appeal dated 10<sup>th</sup> April 2017, the appellants' appeal is based on the following grounds;

*1. THAT the learned trial magistrate erred in law and fact in adopting a multiplicand of Kshs. 30,000 as the deceased's monthly income which amount is arbitrary and not supported by the evidence on record.*

*2. THAT the Judgment of the learned trial magistrate is against the law and weight of evidence on record.*

2. The deceased died in a road traffic accident on 19<sup>th</sup> March 2015 along the Meru-Nkubu road. She was a passenger in motor vehicle registration number KBX 953K owned by the 1<sup>st</sup> appellant which collided with another motor vehicle registration number KBX 058J. After her death, the deceased's administrators and dependants filed suit to recover damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The issue of liability was agreed by consent in the ratio 85:15 against the respondents. The trial court awarded damages as follows;

Pain and Suffering	Kshs.	20,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency	Kshs.	2,520,000/-
Special damages	Kshs.	52,100/-

3. As the memorandum of appeal states, the only issue for determination is whether the trial Court erred in awarding Kshs. 30,000/- as the multiplicand in calculating the amount for loss of dependency under the **Fatal Accidents Act**. According to paragraph 8 of the plaint the deceased was a business lady earning over Kshs. 30,000/- per month. The deceased's husband, Justus Mutembei Muchiri (PW 1) testified that the deceased was doing the business of selling maize, beans, potatoes and cereals and had a stall at Ntherene. He held a joint account with the deceased at Equity Bank and she had a sole account at Co-operative Bank. He produced the bank statements in evidence. In cross-examination, he stated that he did not have any business records.

4. The trial magistrate in arriving at the sum of Kshs. 30,000/- per month as a multiplicand, reviewed the bank statements and came to the conclusion that the deceased was making deposits of over Kshs. 130,000/- per month into her Cooperative Bank Account. This conclusion was condemned by counsel for the appellant who submitted that the deposits from the joint account should have been divided between the two spouses to reach an appropriate multiplicand. Counsel for the respondent, on the other hand, supported the conclusion of the trial magistrate. She noted that the deceased was a business lady depositing money into her account which constituted her income.

5. Determination of the multiplicand is a question of fact and as this is a first appeal, the court must be guided by the principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that the trial court saw and heard the parties (see **Selle v Associated Motor Boat Co. [1968] EA 123**).

6. It is now well established that it would be wrong to insist on documentary evidence in every case to show or prove the earnings of the deceased (see **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR**). In this case though, the respondent relied on documentary evidence in the form of bank statements from Equity Bank and Co-operative Bank as evidence of income from which the deceased's monthly income from her business could be determined.

7. I have reviewed the evidence and I find as follows. The Cooperative Bank statement in the name of the deceased reflects her business income and expenditure. The statement produced covers the period 31<sup>st</sup> December 2014 up to 22<sup>nd</sup> August 2014. The total deposits made in the account amount to Kshs. 1,213,418/-. The average deposits over the period of 8 months was therefore Kshs. 151,677.25. This would represent deceased's gross monthly income. Likewise, for the same period, the deceased withdrew Kshs. 1,341,498/- being Kshs. 167,687.25 per month. Since this was the business account it is not difficult to surmise that she was using the account mostly to run her business of buying and selling cereals rather than support her family.

8. The joint account at Equity Bank held by the deceased and her husband was not a business account. It was probably a joint account used to pay for ordinary family expenses where both the deceased and PW 1 contributed. The Statement runs for a period of 16 months from 17<sup>th</sup> May 2009 to 25<sup>th</sup> October 2010, a period of 16 months. The total amount deposited in the account was Kshs. 519,450/- making an average deposit of Kshs. 32,465/- per month. Since the account was joint, each spouse would probably contribute equally. In my view, this represents the actual income of the deceased. Apart from Kshs. 16,000/-, I would give the deceased additional credit of about Kshs. 5,000/- monthly which she would contribute to the family from time to time since she was in business and would probably draw some cash to support the family. I would therefore conclude that Kshs. 21,000/- would be a suitable multiplicand.

9. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or failed to consider relevant facts or that the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

10. As I have shown the trial magistrate did not consider the bank statements particularly distinguish between the business statement and the joint account before calculating the appropriate multiplicand and thus fell into error by awarding Kshs. 30,000/-.

11. I allow the appeal to the extent that I set aside the multiplicand of Kshs. 30,000/- awarded under the **Fatal Accidents Act** and substitute it with a multiplicand of Kshs. 21,000/- per month.

12. The appellant shall also have costs of this appeal assessed at Kshs. 40,000/-.

**DATED and DELIVERED at MERU this 6<sup>th</sup> day of June 2018.**

**D.S. MAJANJA**

**JUDGE**

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

Ms Ntarangwi instructed by J. K. Ntarangwi and Company Advocates for the respondents.