



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 184 OF 2015

CORAM: D.S. MAJANJA J.

BETWEEN

AWADH YUSUF.....1ST APPELLANT

DAVID KEBESA.....2ND APPELLANT

AND

AGNES BOKE MURIRI suing as the legal

representatives of MARITA MURIRI

WENGESA (Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, SPM

dated 23rd November 2015 at the Chief Magistrates Court

at Kisii in Civil Case No. 143 of 2014)

JUDGMENT

1. The deceased died in a road accident along the Kisii – Kericho road on 11th June 2008. She was a passenger in motor vehicle registration number KBA 850B belonging to the 1st appellant. The 2nd appellant drove the vehicle negligently causing it to overturn. Following her death, the respondent filed a suit claiming damages from the appellants under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*. The trial court found the appellants fully liable and awarded the respondent damages as follows;

Pain and Suffering	Kshs.	50,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency	Kshs...	4,200,000/-
Funeral Expenses	Kshs.	45,000/-
Special Damages	Kshs.	31,535/-
Less	(Kshs.	100,000/-)
TOTAL	Kshs.	4,326,535/-

2. Although the memorandum of appeal raised several issues, Mr Nyambane, counsel for the appellant, informed the court at the hearing that

the appellants were only challenging the multiplicand of Kshs. 35,000/- assessed by the trial magistrate on the ground that the respondent did not prove that the deceased was earning such an income.

3. The respondent supported the judgment and submitted that it was supported by the evidence and that the trial court did not apply wrong principles in arriving at the figure to warrant interference by this court.

4. According to the particulars set out in the plaint and evidence, the deceased was aged 43 years at the time of her death and was engaged in the business of buying potatoes and other farm produce from Kenya and selling them in Tanzania and was earning a daily income of about Kshs. 2,000/-. The key witness on the issue of income was Pili Peter Rugumba (PW 1) who testified that he was in the same business with the deceased. They used to buy potatoes and other produce in Kenya and sell the same in Tarime, Tanzania. He recalled that they were earning a daily profit of Kshs. 2000/- which they would share equally. In cross-examination, he told the court that he did not have any business records in court.

5. The trial magistrate accepted the testimony of PW 1 and held that the deceased was earning an average income of about Kshs. 35,000/- per month which he took as the multiplicand. In addition, the court relied on the case of **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR** to hold that the lack of documentary evidence did not disentitle to the respondent to any claim.

6. The issue raised before the trial court and this court, is that there was no proof tendered that the deceased was earning Kshs. 2,000/- daily. The tenor of the appellant's cross examination was that PW 1 ought to have produced documentary evidence or even tax returns. PW 1 responded that these documents were at home. I agree with the trial magistrate that the lack of documentary evidence could not defeat the claim as was held in the **Jacob Ayiga Maruja Case (Supra)**. There is no suggestion that PW 1 was not a reliable witness. He was with the deceased when the accident took place and she was his business associate. Moreover, and given that the nature of the deceased's business was pleaded and had been disclosed in the witness statements, the appellants had an opportunity to seek discovery of the relevant business documents but they failed to do so.

7. 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 a relevant fact 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, Kemfro Africa Limited t/a Meru Express Service and Another v A.M. Lubia and Another [1982-88]1 KAR 727**).

8. I find and hold that the respondent proved, on the balance of probabilities, that the deceased was a businesswoman and that she was earning Kshs. 35,000/- per month. Since there was sufficient proof of income there was no basis to revert to the minimum wage of a salaried employee or a tradesperson as urged by counsel for the appellant. This position is supported by Asike-Makhandia J., in **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR** that, "*In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005*" [Emphasis mine]. All in all the respondent proved her case.

9. Before I conclude this matter, I wish to draw attention to the fact that when the court makes an award under the **Fatal Accidents Act**, it must in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant of the deceased. I therefore direct that the respondent file the necessary application for consideration before the trial court in due course before any money is released.

10. I dismiss the appeal with costs to the respondent. The appellant shall pay costs assessed at Kshs. 50,000/-.

DATED and DELIVERED at KISII this 19th day of July 2018.

D.S. MAJANJA

JUDGE

Mr Nyambane instructed by Kairu and McCourt Advocates for the appellant.

Mr Begi instructed by Obaga and Company Advocates for the respondent.