



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 12A OF 2017**

**(FORMERLY MACHAKOS HCCA NO. 58 OF 2010)**

HASSAN FARID.....1<sup>ST</sup> APPELLANT

HUSSEIN SHARRIF ABDALLA.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

LEEPALAI SAIDIMU (Legal representative of the estate of

NAKAYIA ENE LEEPALAI.....1<sup>ST</sup> RESPONDENT

LEPARAKUO OLE BACKSON (Legal representative of the estate of

SAYIANET ENE LEPARAKUO.....2<sup>ND</sup> RESPONDENT

KAKURO LEKERAI (Legal representative of the estate of

MATEINA ENE LOORETET.....3<sup>RD</sup> RESPONDENT

THOMAS SOINKEI PAUL (Legal representative of the estate of

MONICA PAUL.....4<sup>TH</sup> RESPONDENT

LEEPALAI SAIDIMU (Legal representative of the estate of

KOSENCHA ENE LEEPA..... 5<sup>TH</sup> RESPONDENT

*(Being Appeals from the Judgments of Senior Principle Magistrate Hon.F.M Nyakundi delivered on 31<sup>st</sup> March 2010 in Makueni Civil Cases No.s 79,80,81,82 & 86 of 2008)*

**JUDGMENT**

**INTRODUCTION**

1. The Appellants were the Defendants in the lower court and the Respondents were the plaintiffs.
2. The suits against the Appellants were for payment of general and special damages resulting from fatalities occasioned by a road traffic accident on 14/11/2006 along the Mombasa-Nairobi highway.
3. Consent on liability was entered in the ratio of 80:20 in favour of the Respondents. This appeal is purely on quantum.
4. After assessment of damages, the learned trial magistrate made the following awards (*after contribution*);

a) CC 79 of 2008: Kshs 429, 716/=

- b) CC 80 of 2008: Kshs 288, 916/=
- c) CC 81 of 2008: Kshs 352,756/=
- d) CC 82 of 2008: Kshs 256,712/=
- e) CC 86 of 2008: Kshs 288,916/=

5. Before proceeding, I have noted that apart from the heading in the parties' documents being misleading, they also omitted CC 86 of 2008 (*estate of Kosencha ene Leepa*) yet it is one of the cases being dealt with in this appeal. I have therefore included it.

### **THE APPEAL**

6. Aggrieved by the said awards, the Appellants filed this appeal and raised common grounds in all the suits. The only variation was in the figures. The grounds are that the learned Trial Magistrate erred in fact and law by;

- a) Awarding special damages without strict proof as required by law.
- b) Using a minimum wage which was higher than the minimum wage provided by labor regulations that were cited to her.
- c) Using a multiplier that was too high in the circumstances.
- d) Failing to appropriately reduce the award under the principle of accelerated payment.
- e) Failing to address the dependency ratio.

7. The appeal was canvassed by way of written submissions. The parties complied and filed their respective submissions. It is noteworthy that the Appellant also relied on their submissions before the trial Court.

### **DUTY OF COURT**

8. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

9. Basically, the Appellants are asking this Court to interfere with the award of damages made by the trial Court. The circumstances that would lead to such interference have been reiterated in numerous authorities across the jurisdictions resulting in uniformity of the general principles.

10. In **Dumez (Nig) Ltd V. Ogboli**{1972} 3 S.C. Page 196 the Court of Appeal of Nigeria stated as follows;

*"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters; or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

11. I will address the grounds of appeal under their distinct heads.

### **SPECIAL DAMAGES**

12. The Appellants submit that the special damages awarded were neither specifically pleaded nor proved.

13. That in all the complaints, there was no prayer for special damages and the complaints were never amended. That the trial magistrate erred by awarding special damages even though the same were mentioned in the body of the complaint. They relied on the Court of Appeal decision in **Civil Appeal No. 192 of 1992; Coast Bus Services Ltd –Vs- Sisco E. Murunga Danyi** and the High Court decision in **Ragajo Christian Children Fund (2004) KLR 73** where it was held that special damages have to be specifically pleaded and strictly proved.

14. On their part, the Respondents submit that special damages were pleaded and proved by production of receipts. That Courts must have discretion for purpose of doing justice to parties. They wonder whether the special damages should be disallowed just because there was no prayer yet they were pleaded and strict proof achieved.

15. To buttress their argument, they rely on Order 4 Rule 6 of the Civil Procedure Rules (CPR) which provides that;

*“Every complaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative and it shall not be necessary to ask for costs, interest, general or other relief which may always be given as the Court deem just, whether or not it could have been asked for or granted when the suit was filed.”*

16. I have looked at all the complaints and it is evident that special damages were specifically pleaded under the heading 'Particulars of loss'. I have also looked at all the exhibits produced and it is clear that the Learned Trial Magistrate disallowed the special damages which were not strictly proved save for burial expenses.

17. The Respondents had pleaded Kshs. 100,000/= for burial expenses in all the suits and in the absence of proof, the Learned Trial Magistrate took judicial notice, and rightly so, that the bodies of the deceased persons must have been interred and some expenses incurred. She awarded kshs 20,000/= in each suit.

18. The law requires specific pleading and strict proof of special damages which is exactly what the Respondents did. I agree with the Respondents that there is actually no requirement for 'specific prayer' of special damages. In any case, prayer'd' in all the complaints was for 'any other or further relief which the honorable Court may deem just and proper to grant' as envisaged by Order 4 Rule 6 of the CPR.

19. In my view, this provision coupled with the unfettered discretion of the Court effectively made up for the absent prayer. Allowing the Appellants' argument to sail would amount to sacrificing justice at the altar of pettiness. This ground of appeal lacks merit and should fail.

#### **MULTIPLICAND**

20. From the submissions, the parties are in agreement that the Learned Trial Magistrate was right to adopt a minimum wage as there was no proof of earnings. The point of departure is whether the multiplicands used were based on the applicable schedule at the time.

21. The Appellants submit that the applicable wage at the time of loss was Kshs. 2,771/= from **column 4 of Legal Notice No. 38 of 2006**.

22. The issue of multiplicand is common in CC Nos. 79, 81 & 82 of 2008. In CC No.s 80 & 86, the deceased persons were minors and the learned trial magistrate awarded a global sum.

23. The evidence on record shows that the deceased persons in CC Nos. 79, 81 & 82 of 2008 were residents of Loitoktok. The deaths occurred in November 2006 and as such, the applicable schedule was as provided in Legal Notice No. 38 of 2006. Loitoktok was neither a city nor a municipality hence column 4 (*all other areas*) of the schedule was applicable.

24. As rightly submitted by the Appellants, the minimum wage applicable was Kshs. 2,771/=. The Learned Trial Magistrate adopted multiplicands of Kshs. 3,000, 5,000/= and 5,000/= respectively which was clearly without basis and therefore erroneous.

#### **MULTIPLIER**

25. The Appellants submit that the multipliers used in CC Nos. 79, 81 & 82 of 2008 were high and not comparable to similar authorities. The Learned Trial Magistrate adopted multipliers of 24, 12 and 8 respectively for deceased persons who were aged 36, 47 and 50 respectively.

26. For CC 79/2008, the Appellant relied on **Nairobi HCCC No. 1064 of 1995; Winter Mutunga –Vs- Reggy John** where a multiplier of 20 was used for a 30 year old.

27. For CC 81/2008, the Appellant relied on **Nairobi HCCC No. 2864 of 1992; Bakar Moraa Galana –Vs- The AG** where a multiplier of 14 was used for a 40 year old.

28. For CC 82/2008, the Appellant relied on **Nairobi HCCC No. 2328 of 1999; Pamela Atieno Olenga –Vs- Tawfiq Bus Services** where a multiplier of 6 was used for a 49 year old.

29. I did not have the benefit of the Respondents' submissions before the lower Court as they were neither in the Record of Appeal nor original record. Further, in their submissions before this Court, their Counsel seems to have confused 'multiplier' with 'dependency ratio'.

30. Be that as it may, I have carefully considered the Appellants' complaint in comparison with the authorities which they relied on.

31. My view is that the multipliers applied by the learned trial magistrate are within an acceptable range. Comparable authorities should of course guide the trial Court and where it is evident that a Trial Court was so guided in the exercise of its discretion, an Appellate Court should be slow to interfere lest it sets a bad precedent that will see litigants running to it even for the slightest variations.

32. As for the global awards made in CC 80 and 86 of 2008, the Appellants had submitted that Kshs. 200,000/= would have been adequate compensation but the learned trial magistrate awarded Kshs. 400,000/= in both. The minors were aged 2.5 and 4 years respectively.

33. In CC 80/2008, the Appellants relied on **Muchoki –Vs- The AG (2004) 2 KLR 518** where the estate of a 4 year old who died in 1991 was awarded Kshs. 200,000/= in 2004. The learned Justice Visram was guided by authorities decided between 1990 and 1998 and the minors involved were between 6 and 7 years.

34. According to the Appellant, the Muchoki case (*supra*) was fairly recent in comparison to our case where the accident happened in 2006, however, the judgment was delivered in 2010 and it can be fairly deduced that the Learned Trial Magistrate considered passage of time and inflationary trends in making her award.

35. In my view, this consideration was lacking in the Muchoki case. I find no reason to disturb the award.

36. In CC 86/ 2008, the Appellants relied on the Muchoki case (*supra*) as well as **Sheikh Mustaq Hassan -Vs- Nathan Mwangi Kamau Transporters & 5 others (1982-88) KLR** which, in my view, is too old to be comparable. Similarly, I find no reason to disturb the award therein.

**FAILING TO APPROPRIATELY REDUCE THE AWARD UNDER THE PRINCIPLE OF ACCELERATED PAYMENT**

37. None of the parties submitted on this issue. My research has not established any binding precedent or legal principle that justifies such a discount. I am therefore not persuaded that the Learned Trial Magistrate erred by not discounting any amount from the total award.

**FAILING TO ADDRESS THE DEPENDENCY RATIO**

38. The Appellants submit that a ratio of  $\frac{2}{3}$  was too high bearing in mind that the deceased persons in CC Nos. 79, 81 & 82 of 2008 were unemployed wives of the plaintiff's.

39. On their part, the Respondents submit that the deceased persons were survived by dependants and the trial Court was right in adopting a ratio of  $\frac{2}{3}$ .

40. It is trite that dependency is a matter of fact which must be proved. The Learned Trial Magistrate did not give reasons for adopting a dependency ratio of  $\frac{2}{3}$  in the three matters.

41. In CC 79/2008, the evidence on record shows that the deceased was survived by a husband and 7 children out of which 6 were in school. The husband (PW1) testified that his work was to move from one are to another with his wife looking for pasture. In my view, sustenance of their family was a joint effort and her contribution was lost through her demise. The ratio adopted was reasonable in the circumstances.

42. In CC 81/2008, the evidence on record shows that the deceased was a widow. She was survived by 5 children i.e. 3 married daughters, one (1) adult son and one(1) minor son. That she had raised the children after her husband's demise and it is therefore my considered view that the minor son was still dependent on her. The ratio adopted was reasonable in the circumstances.

43. In CC 82/2008, the deceased was survived by a husband and 7 children out of which, 4 are married, 2 are adults and one (1) was still in school at the time of trial. The husband died in the year 2007. Similarly, I am convinced that the school going child was dependent on the deceased and will not disturb the ratio.

44. The upshot of the foregoing is that although the Learned Trial Magistrate did not give reasons for the ratio she adopted, it was reasonable in the circumstances.

45. The only thing that has been disturbed is the multiplicand. The workings are therefore as follows;

**CC 79 of 2008**

<b>Under Law Reform Act</b>	
Pain & suffering	10,000
Loss of expectation of life	50,000
Total	60,000
<b>Under Fatal Accidents Act</b>	
Special damages	21,145
Loss of dependency:	
$\frac{2}{3} \times 2,771 \times 12 \times 24$	532,032
	553,177
Less award under Law Reform Act	60,000

	493,177
Less 20% contribution	98,635
<b>Total</b>	<b>394,542</b>

**CC 80 of 2008**

The award has not been disturbed.

**CC 81 of 2008**

<b>Under Law Reform Act</b>	
Pain & suffering	10,000
Loss of expectation of life	50,000
Total	60,000
<b>Under Fatal Accidents Act</b>	
Special damages	20,945
Loss of dependency:	
2/3 x 2,771 x 12 x 12	266,016
	286,961
Less award under Law Reform Act	60,000
	226,961
Less 20% contribution	45,392
<b>Total</b>	<b>181,569</b>

**CC 82 of 2008**

<b>Under Law Reform Act</b>	
Pain & suffering	30,000
Loss of expectation of life	70,000
Total	100,000

<b>Under Fatal Accidents Act</b>	
Special damages	20,890
Loss of dependency: 2/3 x2,771x12x10	221,680
	242,570
Less award under Law Reform Act	100,000
	142,570
Less 20% contribution	28,514
<b>Total</b>	<b>114,056</b>

**CC 86 of 2008**

The award has not been disturbed.

**CONCLUSION**

46. The appeal succeeds partially. The court thus makes the following orders on awards;

**1) Appeal succeeds to the extent above stated;**

i. CC 79 of 08 - award Kshs. 394,542/=

ii. CC 80 of 2008: - Kshs. 288, 916/=

**Award un-disturbed.**

iii. CC 81 of 08 - award Kshs.181,569/=

iv. CC82 of 08 - award Kshs.141,056/=

v. CC 86 of 2008: - Kshs. 288,916/=

**Award un-disturbed.**

**2) Interest from the date of judgement in the lower court.**

**3) Parties to bear their own costs.**

**SIGNED, DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2018, IN OPEN COURT.**

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**C.KARIUKI**

**JUDGE**