



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KENYA AT KISII**

**CIVIL APPEAL NO. 22 OF 2017**

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

**BETWEEN**

**WALTER ORWA OMWANGA.....1<sup>ST</sup> APPELLANT**

**DANIEL ORWA OCHIENG.....2<sup>ND</sup> APPELLANT**

**AND**

**CALEB MADARA DONDO &**

**FOSCA ABOLI DONDO suing as personal representative of**

**of EVANS OKANGA DONDO (DECEASED).....RESPONDENTS**

***(Being an appeal from the Judgment and Decree of Hon. J.M. Njoroge, SPM dated 13<sup>th</sup> October 2016 at the Chief Magistrates Court at Kisii in Civil Case No. 188 of 2013)***

**JUDGMENT**

1. The deceased suffered fatal injuries in accident that took place on 29<sup>th</sup> July 2009 along the Kisii – Migori Highway while he was travelling in motor vehicle registration number KBB 244D which collided with motor registration number KAG 434A owned by the 1<sup>st</sup> appellant. The appellants were found fully liable as against the respondents. At the hearing of this appeal, counsel for the appellants abandoned the appeal against the finding on liability.

2. The trial magistrate awarded the respondent the following damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*:

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 100,000/-
Loss of dependency	Kshs. 3,200,000/-
Special damages	Kshs. 324,700/-
<b>Total</b>	<b>Kshs. 3,644,700/-</b>

3. The main ground of appeal in respect of award of damages is set out in the memorandum of appeal dated 4<sup>th</sup> April 2017 as follows;

*[3] [T]he learned trial magistrate erred in law and in fact by awarding the Plaintiff the gross award of Kshs. 3,534,700 and more particularly in relying on the sum of Kshs. 80,000/- as the multiplicand, which award is so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent, in light of the nature of the evidence tendered on the income of the deceased.*

4. In support of the appeal, counsel for the appellants submitted that the respondents pleaded that the deceased was earning Kshs. 51,137.80 yet the trial court awarded Kshs. 80,000/- which sum was neither pleaded nor proved. The respondent's counsel contended that there was

sufficient evidence to support the judgment thus the trial magistrate reached the proper conclusion.

5. The question of dependency and in particular determination of the multiplicand is a question of fact. Hence this being a first appeal, I am entitled to re-appraise all the evidence and reach an independent conclusion on the matter bearing in mind that neither saw or heard the witnesses testify (see *Selle v Associated Motor Boat Company Ltd [1968] EA 123*).

6. In paragraph 9 of the Amended Complaint, the respondents pleaded their case as follows;

*The Plaintiff(s) herein contend that the Deceased was a healthy vibrant man who was the proprietor, Director of Migori School of Guidance and Counsel and was also working at the said institution as course director whereby he was entitled to a monthly income of Kshs. 51,137.50 besides other proceeds, which institution was a Private institution and at the peak of his career and he anticipated to work for further 20 years and his otherwise productive life was cut short by the reckless and careless conduct of the Defendants and agents who are solely to blame for the occurrence of the accident.*

7. The deceased's son, Caleb Madara Dondo (PW 1) testified that the deceased was the director of Migori School of Guidance and Counselling, where he was earning Kshs. 51,000/- and that he was a part time lecturer at the University of Nairobi and had real estate from which he was earning a total of Kshs. 200,000. He produced a payslip which confirmed that deceased's net salary.

8. In arriving at the sum of Kshs. 80,000/- as a multiplicand, the trial magistrate accepted that the deceased was earning a salary from the college as evidenced by the payslip but added that the deceased was a reverend and earning a monthly income of Kshs. 100,000. The trial magistrate relied on the case of *Jacob Ayiga Maruja & Another v Simeone Obayo KSM CA Civil Appeal No. 167 of 2002 [2005]eKLR* in which the Court of Appeal observed that, "We do not subscribe to the view that the only way of proving earnings is equally the production of documents" to hold that even though PW 1 admitted that he did not have documents in support of his contention that the deceased was earning other income, he would award a multiplicand of Kshs. 80,000/-.

9. As I stated the elsewhere, the determination of the multiplicand is a question of fact. The deceased's net monthly salary was supported by production of the salary slip. The trial magistrate erred in holding that the deceased was a reverend earning about Kshs. 300,000/- when there was no evidence to that effect. The issue of the deceased being a reverend arose in re-examination when PW 1 stated that, "That my father was a reverend burial expenses were reasonable." Moreover, the fact that the deceased was a reverend and his income therefrom was not pleaded in the plaint.

10. The respondents also pleaded that the deceased had a salary and, "other proceeds". It is not clear what these proceeds were. PW 1 alluded to the deceased having income as a part time lecturer and earnings from real estate amounting to Kshs. 200,000/-. It was not clear whether this was monthly or annual income and what part thereof was income from the University or from real estate. Other than the statements on oath, no other evidence was led to support this assertion.

11. The trial magistrate relied on *Jacob Ayiga Maruja and Another v Simeon Obayo (Supra)* where the Court of Appeal held that to insist on production documents, "would do a lot of injustice to very many Kenyans, who are even illiterate, keep no records and year earn their livelihood in various ways." I do not read this holding as saying that a claimant need not produce documents. What the Court of Appeal meant was that there were circumstances where to insist on documents would be unfair and work an injustice. In this case, the deceased or his children cannot be said to be illiterate. Given the nature of alleged income, the documents to support the claim for additional earning would not be difficult to obtain. For example, nothing would be easier than to write to the University of Nairobi to confirm the deceased employment status and his income while title documents from real estate holding would not be difficult to obtain. Further no explanation was given for the lack of such documents.

12. I understand the Court of Appeal to mean that that each case must depend on its own circumstances. Just as it would be unjust to dismiss a claim by a rural fishmonger's wife for failing to produce documentation and it would also be unjust to allow a person to claim that the deceased worked for a well-known and established institution without producing documentation. I would therefore set aside the additional sum of Kshs. 30,000/- which was not pleaded and proved.

13. I allow the appeal only to the extent that I set aside the multiplicand awarded of **Kshs. 80,000/-** and substitute it with **Kshs. 51,137.50**. The appellants shall have the costs of the appeal which I assess at **Kshs.30,000/-**.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of November 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Bosire for instructed by Moronge and Company Advocates for the appellants.

Mr Otieno instructed by O. M. Otieno and Company Advocates for the respondents.