



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 73 OF 2014**

**HABIB ALLI.....1<sup>ST</sup> APPELLANT**

**EDGER KAMANYELE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**RODA ALUOCH OMOLO**

**(suing as the personal representative of the estate of**

**JENIFER A. OMOLO, Deceased).....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Principal Magistrate*

*in Kapsabet PMCC No. 15 of 2013 delivered on 8 May 2014*

*by Hon. B.Mosiria, PM)*

**JUDGMENT**

[1] This appeal was filed on **6 June 2014** by the firm of **M/s Onyinkwa & Company Advocates**, on behalf of the Appellants, **Habib Ali** and **Edger Kamanyele**, from the decision of the Principal Magistrate, **Hon. B. Mosiria**, in **Kapsabet PMCC No. 15 of 2013: Roda Aluoch Omolo (suing as personal representative of the estate of Jenifer A. Omolo) vs. Habit Ali and Edger Kamanyele**. That suit had been filed by the Respondent, **Roda Aluoch Omolo**, in her capacity as the legal representative of the estate of **Jenifer A. Omolo**, now deceased. It was averred in the Plaintiff that was filed before the lower court that, on the **25 November 2012**, the Deceased was travelling aboard **Motor Vehicle Registration No. KAV 812Q along Nandi Hills-Chemelil Road** when the 1<sup>st</sup> Appellant drove **Motor Vehicle Registration No. FK617K-510634, Mitsubishi Lorry**, so recklessly that he caused it to veer off its path and ram into **Motor Vehicle Registration No. KAV 812**, thereby causing fatal injuries to the deceased. Accordingly, the Respondent claimed General Damages under the **Fatal Accidents Act, Chapter 32 of the Laws of Kenya**; Special Damages, costs of the suit plus interest.

[2] The lower court record shows that a consent was entered on liability on **18 April 2014**, thereby settling the question of liability at 85:15 in favour of the Respondent. Hence, only the issue of quantum was left for the lower court's determination and assessment; and having given due consideration to the evidence presented before it as well as the written submissions filed by the parties, the Learned Trial Magistrate awarded a total sum of **Kshs. 637,500/=** made up as follows:

Loss of dependency	:	Kshs. 720,000/=
Special damages	:	Kshs. 30,000/=
Less 15% contribution	:	Kshs. 112,500/=
<b>Total</b>		<b>Kshs. 637,500/=</b>

[3] Accordingly, Judgment was entered in the Respondent's favour in the sum of **Kshs. Kshs. 637,500/=** together with interest and costs and a Decree issued to that effect on **12 August 2014**. Being dissatisfied with the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal, raising the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in failing to be guided by the proper and well laid down principles in awarding damages to the Respondent;

[b] That the Learned Trial Magistrate erred in law and fact in awarding damages to the Respondent based on assumptions and/or speculations, in contravention of the law;

[c] That the Learned Trial Magistrate erred in awarding damages to the Respondent under the **Fatal Accidents Act** for loss of dependency.

[d] That the Learned Trial Magistrate erred in law and fact in failing to hold that damages for loss of dependency were not awardable to the Respondent;

[e] That the Learned Trial Magistrate erred in law and fact in adopting a dependency ratio of 2/3 when no evidence of the same was adduced.

[f] That the Learned Trial Magistrate erred in law and fact in adopting a multiplier of 30 years without being guided by the well laid down principles of law;

[g] That the Learned Trial Magistrate erred in law and fact in adopting a multiplicand of **Kshs. 3,000/=** when the same was not supported by any evidence.

[4] In the premises, the Appellants prayed that the amount awarded in damages for loss of dependency be aside in its entirety and that the costs of the appeal be awarded to them.

[5] The appeal was canvassed by way of written submissions which were filed herein by Learned Counsel for the parties on **25 April 2018** and **7 May 2018**, respectively. Thus, it was the submission of **Ms. Wesonga** that an award for loss of dependency requires hard evidence of income, which was not availed herein; granted that the deceased was a minor with no income and was wholly dependent on her parents. Counsel relied on the case of **T.O.A vs. George Onyango Ogam & Another [2009] eKLR and Abdullahi vs. Githiya [1974] EA 110**. It was further the submission of **Ms. Wesonga** that, had the Respondent taken out a Grant of Letters of Administration and pleaded a global figure for lost years under the **Law Reform Act**, an award to that end would have been tenable; but that, again, this was not done. She relied on **Kwamboka Grace vs. Mary Kemuma Mose [2017] eKLR** in support of this argument. Counsel consequently prayed that the appeal be allowed and that the award for loss of dependency be set aside in its entirety.

[6] **Mr. Nyambegera** for the Respondent defended the Judgment of the lower court, arguing that assessment of damages is essentially an exercise of discretion and that an appellate court will only interfere with an award if it is shown that there is an error of principle. According to him, the lower court rightfully acted on proof by way of evidence, and well informed authorities; and therefore that the assessment of damages and the award was within the parameters awarded in similar cases. Counsel relied on **Kenya Breweries Ltd vs. Saro [1991] eKLR; Abdullahi vs. Bithenye [1974] EA 110** and **Maurice Miriti vs. Feroze Construction Co. Ltd** to justify the award under the **Fatal Accidents Act**.

[7] In response to the submission that no Grant of Letters of Administration was taken by the Respondent, Counsel was of the view that such an omission is not fatal. He relied on **M.N. vs. Paul Kiptoo [2016] eKLR** and **David Ngunje Mwangi vs. The Chairman of B.O.G. Njiri's High School [2001] eKLR** in support of his submission. Counsel consequently urged the Court to find that the appeal lacks merit and to dismiss it with costs and uphold the Judgment of the lower court.

[8] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded, but bearing in mind always that it did not have the advantage of seeing or hearing the witnesses. The holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, is instructive, namely:

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[9] The Respondent testified before the lower court as **PW1**. She told the court that the deceased was her firstborn daughter; and that on **25 November 2012** she was informed that she had died in a road traffic accident. She added that the deceased, who was then aged 15 years, was in good health and was learning at **Miginggo Girls High School** and had just finished Form II. Regarding her prospects in life, it was the evidence of **PW1** that the deceased's school performance was good and had wanted to be a lawyer. She presented her school report before the lower court in proof thereof; and added that the deceased would also help her out with household chores during school holidays. **PW1** also presented documentation before the lower court in proof of the special damage items set out in the Plaintiff.

[10] **PW2** before the lower court was **Goretti Akinyi Omollo**, an aunt of the deceased who was travelling in the same car as the deceased. She gave the lower court an eye-witness account of how the accident occurred and confirmed that the deceased died as a result of the injuries she received in the said accident.

[11] The 1<sup>st</sup> Appellant also testified before the lower court as **DW1**. He confirmed that he was driving the lorry that collided with **Motor Vehicle Reg. No KAV 812Q** and that he had not seen the oncoming motor vehicle because it was a bit dark. It was after the testimony of **DW1** that a consent was entered settling liability between the two parties at 85:15 percent.

[12] Thus, having re-evaluated and reconsidered the entirety body of evidence adduced before the lower court, there appears to be no dispute that the deceased, a 15 year-old school girl, was a passenger in **Motor Vehicle Registration No. KAV 812Q** and that, on the **25 November 2012**, the said motor vehicle was, involved in a collision with **Motor Vehicle Registration No. FK617K-510634, Mitsubishi Lorry**, then driven by the 1<sup>st</sup> Appellant. It was confirmed to the lower court by the 1<sup>st</sup> Appellant that, at all times material to the suit, the latter motor vehicle belonged to the 2<sup>nd</sup> Appellant.

[13] There is similarly no disagreement that the deceased died as a result of the injuries he sustained in the said accident; and liability having been settled by consent, what is in contention herein is the question whether the Learned Trial Magistrate correctly assessed the damages due to the Estate of the deceased in the circumstances; and in this connection, it is to be borne in mind that assessment of damages is a matter of discretion; and that an appellate court will hardly disturb an award made by a subordinate court unless sufficient cause be shown to warrant such interference. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR** the Court of Appeal restated this principle as follows:

**"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."**

[14] I have given due consideration to the proceedings before the lower court, namely, the pleadings, the evidence presented before the court and the submissions and authorities relied on. I have also paid attention to the Judgment of the trial court and the reasons for the decision that was arrived at by it. I do not consider the Appellant's argument to the effect that no Grant of Letters of Administration was taken by the Respondent to be a contentious issue warranting my determination. This is because, it was presented as a hypothetical argument; applicable only if a claim had been laid under the **Law Reform Act**. Counsel for the Appellant conceded that no such claim was laid and there is no dispute about that. In the light of the foregoing, the only issue for determination, in my considered view, is whether the Learned Trial Magistrate erred in principle in awarding damages for loss of dependency under the **Fatal Accidents Act**.

[15] In its Judgment, the lower court took into account the evidence and the submissions made by the parties and came to the conclusion that:

**"The deceased died at the age of 15. She would have probably lived to the age of maturity and worked for another 30 years, being on lower side having in mind the remoteness and speculative element of her lost years all the contingencies of life. She would probably have gotten married and dependency of the parents would not be same as when she is not married and that is why I will adopt a multiplier of 30 years to be appropriate herein.**

**It cannot be stated beyond doubt that the deceased would be a professional although aspiring to be one. The defendant said she was too young and only depended on parents but this court has found that even the parents depended on her in helping in chores around the home and from Sheikh Hassan's authority the parents have expectation of child, I will choose to adopt a wage of Kshs. 3,000/= which definitely the deceased will not lack to have found even if she was to not be a professional even from household chores or even casual laboring this would be easily affordable to her...I do calculate the loss of dependency as ...  $3,000 \times 12 \times 30 \times \frac{2}{3} = 720,000/-$ ."**

[16] It was the contention of the Appellants that since damages under the **Fatal Accidents Act** are for the benefit of the dependants of the deceased, it requires hard evidence not only of income but also of such dependence. According to them, the evidence adduced before the lower court showed that the deceased was dependent on her parents and not *vice versa*; and that in any case, as a student, she had not reached the age of making any income. Moreover, it was urged, as her future could not be predicted, it could not be said with any degree of certainty that she would have lived to full age, or whether she would have been able to hold down a job to earn enough for herself and her family. In a nutshell, it was the contention of the Appellants that the Respondent had failed to prove the claim for loss of dependency. In effect, the Appellants posed the question whether a claim for damages can be maintained on behalf of a deceased minor.

[17] The foregoing question was well considered by the Court of Appeal in the case of **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] eKLR** and an answer provided by Nyarangi, JA thus:

**"...in the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased ... are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise."**

[18] Likewise, in the case of **Kenya Breweries Ltd vs. Saro [1991] eKLR**, the Court of Appeal (differently constituted) restated its position on the matter in the following words:

**"...in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained...But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by**

looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents...In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution...we reject the ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred..." "

[19] In the premises, there can be no doubt that the Respondent was entitled to claim and was rightfully awarded damages under the **Fatal Accidents Act** as a dependant of the deceased. Having so found, the next issue to resolve is whether the lower court adopted the correct approach in terms of multiplicand; multiplier and dependency ratio. The lower court used a multiplicand of **Kshs. 3,000/=** as the basic minimum possible. However, a consideration of similar authorities reveals that the current trend has been to use the basic minimum wage as the multiplicand and a dependency ratio of 1/3, granted the prospect that the deceased could have gotten married, as the trial magistrate rightly noted; and worked up to the retirement age of 60 years. In the premises, taking into account the vicissitudes of life, a multiplier of 30 cannot be said to be unreasonable.

[20] In **Daniel Kuria Nganga vs. Nairobi City Council [2013] eKLR** in which the deceased was 18 years old at the time of his death, the court applied the minimum wage of **Kshs. 8,579.80** as the multiplicand, a multiplier of 30 years and a dependency ration of 1/3; while in **Gilbert Wanjala Fwamba vs. P.N. Mashru [2016] eKLR**, a multiplier of 25 was adopted on the ground that the deceased would probably have started working at the age of 23 years. The court was similarly of the view that a dependency ratio of 1/3 was apt, with the minimum wage of **Kshs.8,579.80** being used as the multiplicand. In the premises, the correct formula in calculating the loss of dependency in this matter would be **Kshs. 8,579.80 x 12 x 30 x 1/3 = 1,029,576/=**. The special damages component was not in contention.

[21] In the premises, I would work out the sums due to the Respondent as hereunder:

Loss of dependency	-	Kshs. 1,029,576
Special damages	-	Kshs. 30,000
<b>Total</b>	-	<b>Kshs. 1,059,576</b>
Less 15% contribution	-	Kshs. 158,936.40
<b>Net total</b>	-	<b>Kshs. 900,639.60</b>

[22] Hence, the appeal is allowed, but only to the extent aforesaid; with the result that the total amount awarded to the Respondent is hereby adjusted to **Kshs. 900,639.60**. The Judgment of the lower court is accordingly hereby set aside and substituted with Judgment in favour of the Respondent in the aforesaid sum of **Kshs. 900,639.60** together with interest thereon from the date of the lower court Judgment and costs of the lower court proceedings as well as the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF DECEMBER 2018**

**OLGA SEWE**

**JUDGE**