

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 122 OF 2017

MAKOKHA JOYCE.....1ST APPELLANT

ALLAN LIDONDE.....2ND APPELLANT

VERSUS

JANE MWANIGA ELABO (suing as *personal representatives and or administrators of the estate of JOASH ASEMBEKHA AMUKAYIA, deceased***RESPONDENT**

(An appeal arising from the judgment and decree of the Hon. B. Ochieng Chief Magistrate in Kakamega CMCCC No. 321of 2015 of 7th October 2017)

JUDGMENT

1. The appellants lodged herein a memorandum of appeal on 6th November 2017, dated 3rd November 2017, in which it is averred that the trial court had erred in law and fact by considering wrong and irrelevant factors in arriving at the quantum of damages awardable and thereby arriving at a figure that that no court properly directing itself on the law and fact would have awarded in the circumstances. It is also argued that the quantum was against the weight of the evidence. It is sought that the decree of the trial court be set aside, and replaced with an assessment of damages based on the correct legal and factual principles that relate to cases of a similar nature and arrive at lower figure as may be appropriate or lawful or just.

2. The factual background to the matter is that the deceased herein met his death on 23rd June 2013 through a motor traffic accident. He was a passenger aboard motor vehicle registration mark and number KBU 033B along the Kakamega-Webuye road, when the same had an accident at Duka Moja area within Kakamega County occasioning on him fatal injuries. The suit at the trial court was by the respondent who accused the appellants of causing the said death by the negligent manner in which the motor vehicle in question was handled by the person who had control of it. He sought damages, both general and special, under the Law Reform Act Cap 26, Laws of Kenya and the Fatal Accidents Act, Cap 32, Laws of Kenya. The respondent countered the claim by attributing negligence, whether wholly or in part, to the deceased, accusing him of not fastening his safety belt and also of attempting to jump out of the vehicle at the time of the accident. It is also suggested that he might have died of other causes unrelated to the accident.

3. The trial court took evidence from the respondent and her witness on 4th May 2016 and 31st May 2016. No counter evidence was presented by the appellants, instead the two sides recorded a consent on liability on 30th June 2016 at the ratio of 80:20 in favour of the respondent herein. Judgment was subsequently delivered on 6th October 2017 at Kshs. 5, 609, 600.00 consolidated general and special damages. Special damages amounted to Kshs. 95, 000.00, broken down into Kshs. 30, 000.00 for grant of representation, Kshs. 5000.00 for demand notice and Kshs. 60, 000.00 for funeral expenses. General damages were awarded under the Law Reform Act and the Fatal Accidents Act. Under the Law Reform Act the court awarded Kshs 30, 000.00 for pain and suffering and Kshs 100, 000.00 for loss of expectation of life. Under the Fatal Accidents Act the court awarded Kshs 5, 514, 600.00 for loss of dependency. The amount awarded under the Law Reform Act was subsequently deducted from the final figure.

4. Directions were given on 24th July 2018 by consent for disposal of the appeal by way of written submissions. The parties have complied, and have each filed their respective written submissions. I have perused through them and noted the arguments advanced.

5. In their submissions, the appellants raise only one issue, that the award on loss of dependency was inordinately high, they have no issue with any of the other awards. They particularly have problems with the multiplier adopted of 7, when the deceased was supposed to leave office within two years. It is their view that the court ought to have adopted a multiplier of 2. Unhelpfully, they cited no authorities to guide the court on the issue. The respondent on her part urged me to uphold the multiplier adopted by the trial court. She cited three cases where the courts adopted fairly high multipliers for persons who had died at great ages. In *Kenya Horticultural Exporters Ltd vs. Julius Munguti Mulwa* CA No. 9 of 2004, the Court of Appeal embraced a multiplier of 18, noting that the respondent in that case, the mother of the deceased was 63 years of age when her unmarried teacher son died in the subject accident.

6. The appeal turns on only one issue, loss of dependency. There are two aspects to loss of dependency the multiplier and the multiplicand. Only the multiplier is in issue here. The trial court used a multiplier of seven (7), which the appellants urge me to reduce to two (2), while the respondent pleads for its retention. The multiplier is determined from an evaluation of the period of time within which the deceased person is estimated to have probably continued working were if not for his untimely death. This is by usually considering the nature of employment that he was engaged in, his age and the general age of retirement in Kenya. Of course, in cases where the deceased is a minor the same may be abandoned as the same would be appropriate in the circumstances to work out loss of dependency. As noted elsewhere, the appellants did not point me to any authorities which would have guided me in the matter. On the other hand the authorities cited by the respondent provide little guidance. In *Kenya Horticultural Exporters Ltd vs. Julius Munguti Mulwa* CA No. 9 of 2004, the deceased was an unmarried serving teacher whose age was not indicated and the court adopted a multiplier of 18. The person whose age was great and who was dependent on

him was his 63 year old mother at the time of his death. In *Abson Motors and others vs. Sinema Kitsao and others* (2016) eKLR, the deceased died at 85 and a multiplier of 5 was adopted. What the court gave premium to was not so much his age, but the nature of his business, he was a herbalist and would have continued practicing the trade even to a greater age so long as he had the strength to move about.

7. The deceased in the instant case was aged 63 at the time of his death, the trial court came up with a multiplier of 7, and according to the court he would have continued working until he retired at 70 years of age. I do note though that the general age for retirement in Kenya is 60 years. That would mean that the deceased was past the age of retirement. He was said to have been a businessman. The nature of the business or trade was not disclosed, and no documentary proof of it was placed before the trial court. The only evidence that was availed related to the organization known as Association of Football Supporters (K), where he allegedly served as a Chair. I entertain serious doubts as to the viability of the said organization, and whether it could sustain the remuneration for the Chair that was placed before the trial court, but I shall pay nothing beyond that as the appellants did not appear to seriously push the alleged officer of the organization who was presented as a witness. According to that officer the deceased was to serve up to 2016, meaning that he died two years shy of the end of his term. Of course the position was elective, and he could have vied for reelection. His reelection was a matter of considerable uncertainty. I believe the figure of Kshs. 98, 475.00 was only certainly available for another two years. As no other source of income was disclosed, the trial ought to have worked out a multiplier of 2 based on the two years that the deceased would have for certain continued to have served as Chairman of the organization. So the loss of dependency should have worked out as follows Kshs. 98, 475.00x2x12x2/3, making Kshs. 1, 575, 600.00.

8. In the end I shall allow the appeal. I shall interfere with the award on loss of dependency by reducing the multiplier adopted by the trial court from 7 to 2. That means that there shall be judgment for the appellant in the sum of Kshs. 30, 000.00 for pain and suffering, Kshs. 100, 000.00 loss of expectation of life, Kshs. 1, 575, 600.00 for loss of dependency and Kshs. 95, 000.00 special damages. The same totals to Kshs. 1, 575, 600.00. After deducting the award for loss of expectation of life, the total comes down to Kshs. 1,800, 600.00. The respondent shall have costs of the suit at the lower court. Interest on the amount of damages here above shall be charged from the date of delivery of the judgment at the lower court. Each party shall bear their own costs on the appeal.

9. Should any party be dissatisfied with the outcome of these proceedings, there shall be leave to appeal against the same at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE