**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 27 OF 2014**

**CONSOLIDATED WITH CIVIL APPEAL NO. 30 OF 2014**

**FESTUS AKOLO…….....……..1ST APPELLANT**

**MARGARET ONYANGO ODUORI……..….....……2nd APPELLANT**

**Versus**

**DICKSON TAABU OGUTU** (SUING AS LEGAL REPRESENTATIVE OF THE

ESTATE OF **WILBERFORCE OUMA WANYAMA(DECEASED)--RESPONDENT**

(***Appeal arising from Judgment and Decree of Hon. M. Wambani Senior Principal Magistrate delivered on 8th October 2014 in Busia CMCC No. 68 of 2014***)

**J U D G M E N T**

1. Wilberforce Ouma Wanyama was, on 18th September 2013, along BusiaMumias Road involved in a Road Accident with Motor Vehicle Registration KAE 147 S towing Trailer ZC 1320. He sustained fatal injuries and the Respondent sued the Appellant herein in a claim for Negligence in respect to the said accident. At the Trial Court the suit was successful and Judgment was entered in favour of the Appellant as follows;-

| | |
|---|---|
| Pain and suffering | Kshs. 20,000/- |
| Loss of expectation of life | Kshs. 80,000/- |
| Loss of dependency | Kshs. 1,200,000/- |
| Special damages | Kshs. 20,000/- |
| **TOTAL AWARD** | **Kshs. 1,320,000/-** |

Both sides being aggrieved with that Decision filed separate Appeals. The two Appeals were consolidated and this decision determines both of them.

2. Dickson Taabu Ogutu (PW1) is a brother to the Deceased. It was his evidence that on 18th September 2013, he received a telephone call from the Deceased who told him that he had been hit by a tractor and was in a critical condition. PW1 took the Deceased to Busia District Hospital where he succumbed to the injuries he had sustained. The witness produced a Certificate of Death

and Postmortem Report in respect to the death of the Deceased. The witness told Court that prior to his death the Deceased was a mason and produced a letter dated 30th December 2012 from The Feliwa Enterprises who are said to be his employer. The witness further told Court that the Deceased was survived by a Wife and a Daughter. The witness produced a Baptismal Certificate (PEXHB 6) for Jackline Ajiambo Ouma. In that certificate Jackline is said to be the daughter of Praxides Achieng Omondi and the Deceased. In respect to Special Damages, the testimony of PW1 was that the family spent the sum of Kenya shillings 100,000/- for funeral expenses. Further, PW1 had to pay the firm of Balongo & Co. Advocates the sum of Kenya shillings 20,000/- to represent him in Probate and Administration proceedings in which he obtained Grant of Letters of Administration to the Estate of the Deceased.

3. The evidence of PW1 was that the 1st Appellant was responsible for the death of the Deceased and had been charged in Busia Traffic Case No. 1198 of 2013 in which he was convicted for the offence of causing Death by Dangerous Driving. The Proceedings to that case were produced as part of the Plaintiff's case (P exhibit 8).
4. The 1st Appellant was the only witness who gave evidence on the part of the Defence. On the fateful day, he was the driver to motor tractor KAE 147 S which was towing trailer ZC 1320. He is a holder of valid Driving Licence (copy of Driving Licence DEXHB 1). As he was driving from Korinda area to Busia weighbridge he saw a Pedal Cyclist in front of him at a place called Ochude, he then put on his indicator as a sign of intention to overtake the Pedal Cyclist. That as he took the overtaking maneuver the back side of the Tractor hit and knocked the Pedal Cyclist. He told Court that he blamed the Pedal Cyclist because it was only the back side of the trailer that hit him. The witness however admitted that he had pleaded guilty to the Charge of Causing Death by Dangerous Driving in respect to the accident. Confronted with an Investigation Report from Koka Investigation Services, the witness conceded that the investigators had concluded that he was the one to blame for the accident.
5. The Appeal by the Appellants raises the following grounds;-

1. **The Learned Magistrate erred in fact and Law in awarding the sum of Kshs. 1,320,000/- as general damages both under Law Reform Act and Fatal Accident Act in the circumstances which amount is inordinately high and excessive and thus constitutes an erroneous estimate of the allege damages suffered by the Respondent.**
2. **The Learned Magistrate thereby used her discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the facts that no evidence was led before her on the basis of which such an award could be found.**
3. **The Learned Magistrate erred in fact and law when she failed in her duty as a trial court to evaluate the evidence, consider the pleadings and to make specific findings in her judgment from the evidence led at the trial and to note the material discrepancies and departure in pleadings which form part of the evidence which the Respondent led at the trial.**
4. **The Learned Trial Magistrate erred in law and fact when in her judgment she relied on documentary evidence which were never produced as exhibits at the trial contrary to the provisions of the Evidence act**
5. **The Learned Magistrate erred in both Law and fact when without reasons and without ascertaining the identity, nature and level of the alleged dependency to the deceased, she pegged the same at the ratio of 2/3 yet the Respondent had failed to establish the same at the trial.**
6. **The Learned Magistrate erred both in Law and fact when she applied Kshs. 5000/- as the deceased's earnings and 30 years as multiplier in the absence of evidence led at the trial upon which such findings could have been based**
7. **The Learned Magistrate erred in both Law and fact when she disregarded the Appellants proposed multiplier and applied her own multiplier without taking into account the vagaries and all the circumstances of life, the age of the deceased as at that time.**
8. **The Learned Magistrate erred both in Law and fact when she applied wrong principles and found liability as against the Appellants at 100% without considering and or evaluating the evidence presented by, and or on behalf of the Appellants.**
9. **The Learned Magistrate erred in both Law and fact when she failed to taken into account the damages under the Law Reform act, while awarding damages under the Fatal accident Act**

**and in failing to appreciate the fact that by failing to do so the estate and the dependants would benefit twice which is irregular in the circumstance.**

10. **The Learned Trial Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed on behalf of the Appellant.**

While that of the Respondents are that:-

1. **The Learned Trial Magistrate erred in fact and law in applying the wrong principles in assessing damages for loss of expectations of life and loss of dependence.**
2. **The Learned Trial Magistrate erred in law and fact in failing to consider and appreciate the totality of the evidence before her with regard to the Deceased income.**
3. **The Learned Trial Magistrate erred in law and fact in the exercise of her judicial discretion as to amount to abuse and improper exercise of a discretion.**
4. **The Learned Trial Magistrate erred in law and fact in awarding damages under the 2 heads that were inordinately low as to amount to gross underestimation of the loss suffered by the estate of the deceased and his dependants.**

6. As the first Appeal Court I am duty bound to reconsider the evidence before the Trial Court, evaluate it and draw my own conclusions bearing in mind that I neither saw nor heard the witnesses testify and I should therefore make due allowance in that respect (**Selle & Another Vs. Associated Motor Board Company Ltd and Others) 1968 EA 123.**

**LIABILITY**

7. On Liability the advocate for the Appellants simply submitted that the Trial Court failed to look at the circumstances of the accident and therefore erred in returning 100% liability against the Appellants. So brief were the submissions in respect of liability that the Respondents' Advocate thought that the Appellants had abandoned the question of liability altogether. For that reason, Counsel did not address this Court at all on the issue of liability.
8. The evidence before the Trial Court was that the first Appellant was charged in Busia Traffic Case No. 2125 of 2013 with the Offence of Causing Death by Dangerous Driving. The particulars of the offence that he faced were that:-

> **"On 18th day of September 2013 at about 8.30 a.m. along Busia –Mumias Road, at Ochude in Busia County being the Driver of Motor Vehicle Reg. No. KAE 147 S / ZC 1320 New Holland Tractor, drove the said motor vehicle on the said road in a manner which was dangerous to the public having regard to all circumstances of the case including the nature, condition and use of the road and the amount of traffic which was reasonably expected to be on the said road thereby causing the death of a pedal cyclist WILBERFORCE OUMA WANYAMA".**

The offence was in respect to the accident that founded the Respondents cause of action. The 1st Appellant pleaded guilty to the said charge and was accordingly convicted and sentenced to a fine of Kshs. 10,000/- and in default a prison term of 3 months. The proceedings were produced as PEXHB 8. It is Trite Law that a Traffic conviction does not necessarily imply that the convict was solely to blame for the accident. But was there evidence to suggest that either the Deceased or some other person contributed to the accident?

9. The only direct evidence in respect to the accident was offered by the 1st Appellant himself. That evidence however seems to buttress the proposition by the Respondent that he (the 1st Appellant) was solely to blame for the accident. This is what he said in his evidence;

> **"I do blame the Pedal Cyclist for the accident because I had overtaken him, but it is only the behind side of the tractor that hit him"**

The Driver was conceding that he did not know how the back side of his tractor hit the Deceased who was cycling. That type of evidence could not help the witness place any contribution on the Deceased. This Court agrees with the finding of the Trial Court that:-

> **"On the part of the first defendant he said that the tractor overtook the deceased but the trailer knocked him. He conceded that he was charged and was convicted.**
>
> **Under cross examination, the first defendant conceded that in fact an internal investigation by the vehicle insurer was done and found him liable"**
>
> **It is on the light of the above sated premises that I hereby find the 1st Defendant 100% liable for the accident".**

**QUANTUM**

10. An Appellant Court will only disturb an award of Damages by the Trial Court if it is satisfied that:-

a. In assessing the damages, the Trial Court took into account an irrelevant factor or left out a relevant factor or;
b. The amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

The Trial Court made an award under the following heads

| | | |
|---|---|---|
| a. | Pain and Suffering | Kshs. 20,000/- |
| b. | Loss of Expectation of life | Kshs. 80,000/- |
| c. | Loss of Dependency | Kshs. 1,200,000/- |
| d. | Special Damages | Kshs. 20,000/- |

Looking at the Memorandum of Appeal and the submissions by Counsel they do not challenge the Learned Magistrate's findings on Damages for Pain and Suffering and Specials. I see no reason to discuss those two limbs.

11. In respect to Loss of Expectation of Life, only the Respondent is aggrieved. He thinks Kshs. 80,000/- was low and has asked this Court to enhance it to Kshs. 100,000/-. Even if I were to agree that Kshs. 100,000/- would be the more reasonable sum, I do not think an award of Kshs. 80,000/- is so inordinately low as to warrant an interference.
12. The Award on loss of Dependency aggrieved both sides. The Appellant's Counsel submitted that-

a. There was no evidence to establish Dependency
b. There was no proof of earning
c. The Multiplier adopted was high.

On the other hand the Respondent's Counsel made the argument that the multiplicand adopted by the Court ought to have been Kshs. 9700/- per month and not Kshs. 5000/- per month.

13. Was there evidence of income? In the Plaint it was averred that

> "**He was employed by <u>Felix Wanyama</u> as a Supervisor of his ranch earning Kshs. 9700/- per month…" (my emphasis)**

The Plaint was making reference to the Deceased. At Trial, PW1 stated that the Deceased was a mason prior to his death and was working with Feliwa Enterprises. The witness then produced a letter dated 30.12.2012 from Feliwa Enterprises as proof of that employment. One notices that on the letterhead of Feliwa Enterprises, Felix Wanyama is named as a Director. We are, of course,

not told whether Feliwa Enterprises was a Limited Liability Company or simply a Business name and this Court believes that, on a balance of probabilities, the Deceased was employed by Feliwa Enterprises in which Felix Wanyama had an interest.

14. The letter of 30.12.2012 was accepted in evidence by the Defence without requiring its Maker or fielding questions in respect to its contents. The ultimate paragraph of the letter which was addressed to the Deceased reads as follows;-

> **"We hereby further demote you as supervisor for 2 months your salary shall be reduced from 9,700/- to Kshs. 7900/- until you (sic) demolition (sic) is lifted on 1st March 2013"**.

The Deceased died on 18th September 2013 by which time he ought to have already assumed is supervisor's position.

15. Was the letter sufficient proof of the Deceased's pay? The Appellants Counsel did not think so but Counsel for the Respondent submitted as follows;-

> **"In our local Kenyan content it would be unfair and unjust to insist on production of documents (read payslip) as proof of earnings"**

On this matter this Court takes guidance in the passage from decision **Jacob Ayija Masiga & another Vs Simeon Obayo** Quoted by the Court of Appeal in **Michael Huberts Kloss & Another vs David Seroney & 6 Others** [2009] eKLR. The Court Stated,

> **As for Special damages, Mr.Wasonga submitted, and correctly so, that they should not only be specifically pleaded but also strictly proved. That is the general law and authorities on it are legion. We are also guided by the decision of this Court in Jacob Ayiga Maruja & Another V Simeon Obayo (suing as the administrator of the estate of Thomas Ndaya Obayo. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things." My emphasis**

As noted earlier the letter of 30.12.2012 was accepted by the Defence without challenge. The letter was from the Employer of the Deceased to the Deceased. In part, the letter stated that the salary of the Deceased would be reduced from 9700/- to 7900/- from the date of the letter until 1st March 2013 when his demotion would be lifted, I accept that the contents of the letter proved that at the time of his Death the Deceased earned a salary of Kshs 9700/- per month. The Courts view differs with that of the Trial Court which adopt a sum of Kshs. 5000/- because no payslip was produced.

16. On the Dependency ratio, the Plaint stated that the Deceased **"was a provider to his aged parents and to his daughter Jackeline Ajiambo Ouma."** The evidence in Court did not entirely support this averment. There was evidence, by way of a Baptismal Card, that the Deceased had a daughter by the name Jackline Ajiambo Ouma who was born on 30th October 2011 and who would therefore have been about 2 years at the time of Death of the Deceased. There was nothing said of the support the Deceased gave his "aged parents". Although there was mention by PW1 that the Deceased was married to one wife, he did not say that she depended on him. And if he had said so then it would not be consistent with the pleadings where she was not mentioned as a Dependent. And as though to affirm that the child was the only Dependant, PW1 stated as follows:

"**I pray for both General, Special Damages and costs and Interest of this suit to enable the Deceased's child get education."**

From my own evaluation of the pleadings and the evidence I reach a conclusion that it was proved that the Deceased had only one Dependent and that was his daughter, Jackeline. I find and hold that the Learned Trial Magistrate was therefore wrong in holding that-

"**Because the Deceased was the sole provider for his parents, the wife and his daughter, I will adopt a dependency ratio of 2/3 on an income of**

**Kshs. 5000/-"**

I take the view that a multiplier of 1/3 is more appropriate.

17. Was a Multiplier of 30 years adopted by the Learned Magistrate reasonable? In the Death Certificate the age of the Deceased is stated to be 30 years. The Court adopted a retirement age of 60 years. That retirement age is not questioned by the parties and is acknowledged to be a reasonable retirement age in the Kenyan context and in fact the retirement age for a majority of Public Servants. But by using a multiplier of 30, the Learned Trial Magistrate did not take into account the vicissitudes and imponderables of life. I would think that a multiplier of 25 is more reasonable.
18. In my view the Loss of Dependency should have worked out as follows:-

9700/- x 1/3 x 12 x 25 = 970,000/-

This Court interferes with the award of the Magistrate of Kshs. 1,200,000/- because it was reached on the basis of a misapprehension of some relevant factors.

19. The Appellants also submitted that the Trial Court failed to take into account the Damages awarded under the Law Reform Act in making the award under the Fatal Accidents Act. The Court of Appeal in **Washington Waweru (suing as the Legal Representative of Peter Waweru Mwenga (Deceased) vs Kiarie Shoe Stores Limited** [2015] eKLR recently stated as follows:-

> **This Court has explained the concept of double compensation in several decisions and it is surprising that some court continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform act and dependants under the Fatal accidents act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication not arise.**

Jackline Ajiambo Ouma is the only Dependant of the Deceased and may well be the only beneficiary to his Estate and will benefit from the Damages under both the Law Reform Act and the Fatal Accidents Act. That said, I have already observed that the award made by the Court under the Law Reform Act for loss of Expectation of Life may have been lower than the award deserved. I prefer to hold that the low award made under that heading is a sufficient discount on the overall damages in view of the award under the Fatal Accident Act.

20. The upshot. The Respondent's Appeal fails in its entirety and is dismissed with costs. The Appellants Appeal succeeds to the extent that the damages for loss of Dependency is reduced from Kshs. 1,200,000/- to Kshs .970,000/- The Award of Damages is therefore:-

a. Pain and Suffering Kshs. 20,000/-
b. Loss of Expectation of Life Kshs. 80,000/-
c. Loss of Dependency Kshs. 970,000/-

d. General Damages Kshs. 20,000/-

Kshs.1,090,000/-

The Appellant will have 1/3 of costs of The Appeal.

**Dated, signed, and delivered at Busia this 1st day of February 2016.**

**F. TUIYOTT**

**J U D G E**

In the Presence of :-

Oile - C/Assistant

Jumba h/b for Ojwang for the 1st & 2nd Appellants

Otanga h/b for Omondi for the Respondent