



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 896 of 2005**

**FRANCIS K. NTHIWA.....APPELLANT**

**VERSUS**

**GREGORY K. MWANGANGI .....1<sup>ST</sup> RESPONDENT**

**KANINI KISWILI MWANGANGI.....2<sup>ND</sup> RESPONDENT**

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

1. Francis K. Nthiwa, (hereinafter referred to as the appellant), is dissatisfied with the judgment delivered against him, by a Senior Resident Magistrate, in Thika Civil Case No.810 of 2001. The appellant had been sued by Gregory K. Mwangangi and Kanini Kiswili Mwangangi, (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents).
2. The respondents who were the Administrators of the Estate of Patrick Mwangangi, (hereinafter referred to as the deceased), sued the appellant for special and general damages under the Law Reform Act, and the Fatal Accidents Act arising from the death of the deceased. The respondents contended that the deceased's death was caused by the negligence of the appellant or his agent or driver.
3. The appellant filed a defence denying the respondents' claim. However, following negotiations, judgment on liability was recorded by consent in favour of the respondents at 90%. The parties having failed to agree on quantum, the suit proceeded to hearing before the Senior Resident Magistrate for purposes of assessment of damages.
4. The only witness who testified in proof of the respondent's claim was the 1<sup>st</sup> respondent. He testified that he was born in 1947 and was father to the deceased. He stated that the deceased who was 19 years old as at the time of his death, was working for Del Monte earning a salary of about 1,000/=. He testified that the deceased used to give him Kshs.500/=. The deceased's payslips for the months of November and December, 1998 were produced in evidence by consent. The witness claimed that he spent Kshs.26,000/= as funeral expenses. There was no evidence adduced on behalf of the appellant nor did his counsel make or file any submissions.
5. Counsel for the respondents filed written submissions in which he urged the court to adopt a multiplier of 35 years and a dependency ratio of  $\frac{2}{3}$  and therefore award damages of Kshs.436,00/= under the Fatal Accidents Act. Counsel further urged the court to award Kshs.50,000/= in respect of pain and suffering and Kshs.150,000/= in respect of loss of expectation of life.

6. In support of his submissions counsel relied on the following authorities:

- ***Purity Nyokabi Wachira vs Jeremiah Ntoiti Karithi & Another (Nairobi) HCCC No.795 of 1995.***
- ***Teresia Njeri (suing as representative of Peter Ndachi Muriuki) vs Kenya Breweries Ltd & Another, Nakuru HCCC No.374 of 1997.***
- ***Nelson Namu Elijah vs James Nganga Mbau & Others Machakos HCCC No.56 of 2000.***

Counsel further urged the court to find the sum of Kshs.26,000/= spent as funeral expenses reasonable and award the same.

7. In his judgment, the Senior Resident Magistrate having considered the authorities cited to him awarded the respondents Kshs.100,000/= for loss of expectation of life, Kshs.20,000/= for pain and suffering, Kshs.436,800/= for loss of dependency and Kshs.26,000/= for special damages, all being subject to 10% contribution.

8. The appellant has challenged the judgment on 5 grounds as follows:

(i) The learned magistrate erred in law and in fact in awarding general damages that were too high or excessive in the circumstances.

(ii) The learned magistrate erred in law and in fact in awarding general damages that were too high or excessive in the circumstances.

(iii) The learned magistrate erred in law and in fact in failing to exercise his discretion judicially.

(iv) That the learned magistrate erred in law and in fact in failing to evaluate the available evidence in coming to the conclusion he did on general damages.

(v) The learned trial magistrate erred in law and in fact in failing to appreciate the fact that special damages were not specifically pleaded and proved.

9. Mr. Mbugua who appeared for the appellant faulted the trial magistrate for adopting a dependency ratio of  $\frac{2}{3}$  when the deceased's father had testified that he was only being given Kshs.500/=. Mr. Mbugua further submitted that there was no basis for the multiplier of 35 adopted by the trial magistrate. He maintained that the multiplier ought to have been 12 or 10 years, based on the age of the deceased's father, who was about 52 years at the time of the deceased's death.

10. In this regard Mr. Mbugua relied on:

- ***Khimji vs Bakari & Others [1968] EA 685.***
- ***Kahurram Assad Kamal Saddique vs Aircraft Leasing Services, HCCC No.1582 of 2001 (U.R).***
- ***Peggi vs Railways Corporation [1971] EA 103***

11. With regard to the award of Kshs.100,000/= in respect of loss of life expectancy, Mr. Mbugua argued that the trial magistrate ought not to have awarded more than Kshs.70,000/= which was proposed in the submission made by the respondent's counsel.

12. Finally Mr. Mbugua submitted that the trial magistrate ought not to have awarded damages under the Law Reform Act and also under the Fatal Accidents Act. He maintained that damages under the Fatal Accidents Act should have been taken into account in awarding damages under the Law Reform Act as a party cannot have both. In support of his submissions Mr. Mbugua relied on the following authorities:

· ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another vs Lubia & Another [1987] KLR 30.***

· ***Nelson Namu Elija vs James Nganga Mbau & Others Machakos HCCC No.56 of 2000.***

13. Mr. Uvyu who appeared for the respondents opposed the appeal. Relying on the ***Kemfro Africa Ltd*** (supra), Mr. Uvyu submitted that the trial magistrate was right in awarding damages under the Law reform Act and the Fatal Accidents Act. He maintained that Section 4(2) of the Fatal Accidents Act only requires the court to take into account that damages have also been awarded under the Law Reform Act, while Section 2(5) of the Law Reform Act confirmed that rights under that Act conferred by or for the benefit of the estate of the deceased, was in addition to rights confirmed under the Fatal Accidents Act.

14. With regard to the dependency ration of  $\frac{2}{3}$ , counsel for the respondents maintained that that ratio was not excessive. He referred the court to the cases of ***Nelson Namu Elijah*** (supra), and ***Kahurrrum Assad Kamal Saddique*** (supra), in which the same ratio was adopted.

15. As concerns the multiplier of 35 adopted by the trial magistrate, Mr. Uvyu submitted that the deceased having been only 19 years, the same was appropriate. Counsel relied on ***Teresia Njeri vs Kenya Breweries Ltd HCCC No.374 of 1997*** in which a multiplier of 10 was used in respect of a deceased who was 46 years of age, based on the premises that the deceased could have worked for ten more years before his retirement age.

16. Counsel argued that the deceased herein who was 19 years old, could have worked for another 35 years before retirement. Counsel further argued that the court had no reason to use the age of the deceased's father as a basis for the multiplier, when the deceased's mother was 37 years old at the time of the deceased's death. He therefore urged the court to uphold the judgment of the lower court and dismiss the appeal.

17. I have carefully considered the evidence which was adduced before the trial magistrate and the submissions which were made. I have also considered the submissions made before me. It is apparent that the appellant is dissatisfied with the award which was made by the trial magistrate. The principles upon which an appellate court can disturb a quantum of damages awarded by a trial judge, are well settled to wit:

***“The appellate court must be satisfied that either the trial 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. [Kemfro Africa Ltd vs Lubia](supra)”.***

18. In this case, four main reasons have been given as to why the award of the trial magistrate should be disturbed. Firstly, is the dependency ratio of  $\frac{2}{3}$ , used by the trial magistrate. It is generally accepted that where there is no evidence to the contrary a deceased person is presumed to use  $\frac{1}{3}$  of his salary on his/her own needs and  $\frac{2}{3}$  on the dependants. However, dependency is generally a matter of fact and where there is specific evidence regarding the actual rate of the dependency, there is no need for the court imposing a presumption which is contrary to the evidence. In this case, the evidence adduced on behalf of the respondents was clear, that the deceased was only spending 500/= on his parents which was about  $\frac{1}{3}$  of his income. The dependency ratio having been established, there was no justification for the court adopting a presumptive dependency ratio of  $\frac{2}{3}$ .

19. The 2<sup>nd</sup> issue which was raised was the multiplier of 35 adopted by the trial magistrate. The judgment does not appear to give any basis for this, but it would appear that the trial magistrate was influenced by the age of the deceased which was 19 years. According to the plaint the deceased was survived by 6 dependants, i.e. 1<sup>st</sup> and 2<sup>nd</sup> respondents who are his father and mother, 3 sisters and a brother. In his evidence however, the 1<sup>st</sup> respondent did not mention the other dependants save to state

that he has other children.

20. In fact, the 1<sup>st</sup> respondent clearly stated that the Kshs.500/= which he was being given by the deceased was for himself and his wife. That is to say, that the evidence before the trial magistrate was that the deceased had only two dependants. Having been born in 1947 the deceased's father was about 52 years, at the time of the deceased's death. No evidence was adduced with regard to the age of the deceased's mother which was pleaded as 37 years in the plaint. Be that as it may, I do concur with the submissions made by the appellant's counsel that the court ought to have taken into account the age of the dependants in arriving at the multiplier. If this were done, an average multiplier of 15 would have been appropriate taking into account the ages of the dependants.

21. In the light of the above, I find that the trial magistrate did not take into account the actual evidence relating to the respondents dependency and the ages of the dependants which were relevant factors in assessing the damages for loss of dependency. Had he done so, the quantum of damages in respect of loss of dependency using a dependency ratio of  $\frac{1}{3}$ , a multiplier of 15, and the deceased's income of 1560 would have worked out as follows:

$$15 \times \frac{1}{3} \times 12 \times 1560 = 93,600/=.$$

22. With regard to loss of expectation of life, the trial magistrate awarded a sum of Kshs.100,000/=. The trial magistrate was rightly guided by the authorities cited to him and I find no reason to disturb this award.

23. The more pertinent issue is the 4<sup>th</sup> issue raised Mr. Mbugua that the trial magistrate ought not to have awarded damages under the Law Reform Act and also under the Fatal Accidents Act, or to put it in another way, whether the trial magistrate ought to have deducted the amount found due in respect of loss of expectation of life under the Law Reform Act from the amount found due under the Fatal Accidents Act in respect of loss of dependency.

24. Contrary to the submissions of Mr. Mbugua, the trial magistrate only needed to take into account the fact that he had already awarded damages under the Law Reform Act. In this case, although the judgment of the trial magistrate does not show that such was the case, in reassessing the damages payable under the Fatal Accidents Act, I have taken into account the damages awarded under the Law Reform Act. The trial magistrate also awarded damages for pain and suffering, and funeral expenses. These special damages were specifically pleaded. Although no evidence was adduced in proof thereof, the amount awarded was fairly reasonable and I find no reason to disturb this award.

25. In the light of the above, I set aside the award made by the trial magistrate, and substitute thereof a judgment in favour of the respondent and award damages under the Law Reform Act as follows:

Kshs.100,000/= loss of expectation of life,

Kshs.20,000/= for pain and suffering,

Kshs.26,000/= for funeral expenses,

Damages under the Fatal Accidents Act as follows:

Kshs.93,600/= .

26. This judgment is subject to the agreed contribution of 10%. The respondent shall further have costs of the suit in the lower court. Those shall be the orders of this court.

**Dated and delivered this 3<sup>rd</sup> day of June, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mbugua for the appellant

Uvyu for the respondent

Erick – Court clerk