REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E012 OF 2024

ABDILLAHI ALI ADAN……1ST APPELLANT

HASSAN ABDILLAHI ALI……2ND APPELLANT

-VERSUS-

MILDRIN ANYANGO ASEKA (Suing as the administrator of the Estate of

JOHNSTONE LOKALE LORUDU (DECEASED) ……..RESPONDENT

JUDGMENT

1. This appeal emanates from a decision of the trial court presided by CM Muhoro, SRM where the Respondent sued the Appellants, seeking general damages under the **Fatal Accidents Act and the Law Reform Act** totaling to Kshs.6,400,000 and special damages of Kshs.512,300/-.
2. Judgment on liability was entered by consent of parties at 80:20% for the Plaintiff. The court having considered the matter awarded the Plaintiff a total of Kshs.2,970,000/- plus costs and interest following the percentage agreed on.
3. Aggrieved by the decision of the court, the Appellants appeals on grounds that;

a) ***That the learned Magistrate erred in law and fact in failing to give weight to, fathom or to consider the Appellant's written submissions and authorities.***

b) ***That the learned Magistrate erred in law and fact in assessing damages on loss of dependency excessively.***

c) ***That the learned Magistrate erred in law and fact in assessing and allowing special damages without proof of payment.***

4. The appeal was disposed through written submissions. It is contented by the Appellant that damages for loss of dependency were assessed excessively; at Kshs.3,000,000/- by adopting a global sum approach instead of adopting the minimum wage approach proposed by the Appellant whose submissions were not appreciated. Reliance in this regard was placed on the case of ***David Kimani Githinji & Grace Mbaile (Suing as the Administrators of the Estate of Catherine Njeri Kimani (Deceased) v Muturi Hardware Stores Limited [2019] eKLR*** where it was stated that;

> ***"In the absence of clear documentary proof of income, a court ought not to merely disregard the claim as though the claimant or deceased had no livelihood at all. That would lead to injustice of great proportions. In such case the court correctly ought to revert to the applicable***

Regulations of Wages Order at the time of death or to a global figure in appropriate cases, for instance, when the deceased is a minor."

5. That the global figure should be used in an instant where the deceased is a child, although the court retains discretion which must be expressed judiciously as held in the ***David Kimani case (Supra).*** That the deceased having been 48 years old, the best approach should have been proof of his actual occupation then the minimum wage approach to be considered should have been a casual labourer and a multiplicand of Kshs.7,240/- adopted.

6. That even if the court found that there was no error in adopting the global sum approach, the amount of Kshs.3,000,000/- is extremely excessive, reliance is placed on the case of ***Frankline Kimathi Baariu & Another v Philip Akungu Mitu Mborothi (Suing as the Administrator and personal representative of Anthony Mwiti Gakunyu (Deceased) [2020] KEHC 5897 (KLR)*** where the court held that;

"In Moses Mairua Muchiri v Cyrus Maina Macharia [2016] eKLR, a global sum of Kshs.1,700,000/- was awarded to a lady aged 30 years who was employed and who had evidence of making deposits into her account averaging about Kshs.22,000/- would be reasonable.

27. In the present case, the deceased was aged 36 years and had two young children aged 8 and 16 years, respectively. An award of Kshs.1,300,000/- would be reasonable."

7. On special damages, that the only receipt available was for Kshs.10,500/-.

8. The Respondent reiterated submissions made in the lower court. Further, that the global award was made on the measuring that the income of the deceased could not be ascertained with precision and the court sought guidance in ***Mwanzia v Ngalali Mutua & Kenya Bus Ltd*** as cited in ***Albert Odawa v Gichumu Githenji NKU HCCA No. 15 of 2003 [2007] eKLR*** where the following observation was made;

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice

justice on the altar of methodology, something a court of justice should never do."

9. That the trial court further relied on the case of ***Mary Khayesi Awalo & Nickson Vielitha v Mwilu Malungu & Another [1999] KEHC 44 (KLR)*** where the court stated that;

"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. See the case of Sheikh M. Hassan v Kamau Transporters and 10 Others (1982 -88) 1 KAR 946."

10. That the loss of dependency was rightly assessed and the special damages of kshs.512,500/- claimed were proved on a balance of probabilities.

11. This being a first appeal, this court is mandated to re-evaluate afresh evidence presented before the trial court and reach its own conclusions. This duty was set out in ***Selle v Associated Motor Boat Company Ltd [1968] EA 123*** as follows;

"This being a first appeal, it is trite law, that this court is not bound necessarily to accept the

findings of fact by the court below and that an appeal to this court from a trial by the High 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 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and Others [1968] EA 123 and Williamson Diamonds Ltd. v Brown [1970] E.A.I.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this court said in <u>Peters vs Sunday Post Ltd [1958] EA 424.</u> In its own words;

> ***"whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted***

or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide…"

12. Also, in ***Kiruga v Kiruga & Another [1988] KLR pg. 348*** where the Court of Appeal held that;

"An appeal court cannot properly substitute its own finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

13. The gravamen is the damages awarded. The award of quantum of damages is primarily the duty of the trial court. In determining what damages to award, the court exercises its discretion, therefore for an appellate court to interfere with the damages awarded laid down principles must be upheld.

In ***Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A.M. Lubia & Olive Lubia [1987] KAR 30*** the court held that;

"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by

a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages."

14. The basis of the award was following the evidence that the deceased was 48 years old at the time of his death and he used to earn Kshs.45,000/- and was engaged in the boda boda industry. The Plaintiff who had the duty of proving the allegations on a balance of probabilities failed to do so. The court rightfully found that there was no proof of income.

15. For this reason, the Appellant argued that damages for loss of dependency should have been based on the minimum wage approach and a multiplicand of Kshs.7,240.95/- for casual labourer adopted.

16. In its wisdom the trial court settled for a global figure, because the court failed to ascertain the deceased's income. Indeed, as held in the ***Mary Khayesi Awalo Case (Supra)*** the court was of the view that the principle of a lumpsum award should be preferable instead of making estimates that are mere conjecture.

17. As clearly stated in the ***Albert Odawa case (supra)*** global figures are preferred where an income of the deceased

cannot be ascertained, children who had no income as well as unemployed people. In such cases it would be difficult to apply the multiplier methods hence the easier way would be to adopt the global figure.

18. The Appellant however contends that the figure awarded of Kshs.3,000,000/- was too high. In reaching the decision to make the impugned award the court was of the view that the deceased having been in boda boda business used to support his family and was in good health. It has been demonstrated that at the time of this death the deceased was riding motorcycle Reg. No. KMDA 262H which was registered in the name of BMG Holdings Ltd. The informal sale agreement adduced is in the name of Francis Kamau King'oo and Lokale Lorudu Epetet (deceased) without evidence being adduced to explain the relationship between Francis and BMG. It may not be established if the deceased was the owner of the motorcycle or just a rider. Therefore, the learned trial Magistrate was justified in not speculating as to the income the deceased used to make. The trial court had the discretion and there was no misdirection on its part.

19. On the question as to whether the sum awarded was excessive; the deceased contributed to his household. He had a wife and children. Three of the listed purported dependents were adults while three of them were minors. Adult sons would not be expected to depend on him but for the three minors it should have reasonably presumed that the

support would have been continuous. The award being an estimate the figure must be just and reasonable.

20. In ***Ainu Shamsi Hauliers Limited v Moses Sakwa & Another (Suing as the Administrators of the Estate of the late Ben Siguda Okech (Deceased) [2021]*** where the deceased died aged 40 years survived by a wife and two young children an award granted of Kshs.2,000,000/- was upheld by the Court of Appeal.

21. The age of the three (3) minors was not given. The learned trial Magistrate in giving the Kshs.3,000,000/- was a bit excessive as the circumstances that persuaded the court were not stated. In the circumstances, I find a sum of Kshs.2,100,000/- to have been reasonable.

22. On the award of special damages, it is argued that the same were not proved. This must be pleaded and specifically proved. In ***Hahn v Singh [1985] KLR 716*** the Court of Appeal stated that;

> ***"special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves."***

23. The claim pleaded was for Kshs.512,500/- which was awarded by the court. Notably only a receipt for hospital bills amounting to Kshs.10,500/- was adduced in evidence. Receipts on what was expended on the funeral would have been the best evidence. It was proved that that a burial took place, hence some funeral expenses must have occurred save that the sum of Kshs.400,000/- was unexplained. To prosecute the case some legal fees was incurred, however, no receipts were provided. The question of a motorcycle having costed kshs.62,500/- is in doubt as this court queried the issue of ownership.

24. In ***Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] KECA 146 (KLR)*** it was held that;

> ***"The courts have also awarded reasonable and legitimate funeral expenses when claimed even in the absence of proof. It is only where a large sum is claimed for such expenses that strict proof ought to be established."***

25. In the interest of justice, I would add a reasonable sum for what is within common knowledge. I find a cumulative sum of Kshs.200,000/- reasonable, hence award a total sum of Kshs.210,000/- for special damages.

26. The upshot is that the appeal succeeds partially, therefore, I allow the appeal, set aside the judgment of the trial court and enter judgment thus; liability remains at 80:20% for the Plaintiff;

- **Damages for pain and suffering** **Kshs.100,000/-**
- **Loss of expectation of life** **Kshs.100,000/-**
- **Loss of dependency**
  Kshs.2,100,000/-
- **Special damages** **Kshs.210,500/-**

Total
Kshs.2.510.500/-

Less 20% apportionment **Kshs.502,400/-**

Kshs.2,008,400/-

Hence a sum of two million, eight thousand, four hundred shillings.

27. Each party to bear their own costs on appeal.

28. It is so ordered.

Dated, signed and delivered virtually this 26th day of January, 2026.

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L.N. MUTENDE

JUDGE