



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: NAMBUYE, KIAGE & J. MOHAMMED JJ.A.)**

**CIVIL APPEAL NO. 100 OF 2017**

**BETWEEN**

**FRANCIS K. RIGHA.....APPELLANT**

**AND**

**MARY NJERI (*suing as the Legal Representative of the Estate of***

**JAMES KARIUKI NGANGA.....RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya***

***(Hon. R. P. V. Wendoh, J.) dated 11th July, 2014***

***in***

**Nakuru Civil Appeal No. 186 of 2010)**

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**JUDGMENT OF THE COURT**

The appeal arises from the judgment of the High Court at Nakuru (**Hon. R. P. V. Wendoh, J.**) delivered on 11th July 2014.

A brief background to the appeal is that **Mary Njeri**, (the respondent) filed **Nakuru CM's Civil Suit No. 1547 of 2007** against **Francis K. Righa**, (the appellant), seeking general and special damages arising from the fatal accident involving the deceased and the appellant's motor vehicle Reg. No. **KAT 232V** which while in the process of avoiding a cyclist, veered off the road and hit the deceased. He sustained injuries, was rushed to hospital but died on 25th January, 2007 while undergoing treatment. Both parties gave oral testimony and filed submissions in support of their respective cases. The trial magistrate upon evaluating the record pinned 100% liability for the death of the deceased against the appellant and awarded damages as follows:

<b>1) Pain and suffering</b>	<b>Kshs. 40,000.00</b>
<b>2) Loss of expectation of life</b>	<b>Kshs. 100,000.00</b>
<b>3) Special damages</b>	<b>Kshs. 114,815.00</b>
<b>4) Loss of dependency</b>	<b>Kshs. 1,000,000.00</b>
<b>Total</b>	<b>Kshs. 1,254,815.00</b>

The appellant appealed to the High Court against the above decision raising various grounds. The learned Judge bearing in mind the mandate of a first appellate court as enunciated in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968 E.A 123] reviewed the record and made findings thereon *inter alia* that: the circumstances under which the accident occurred clearly supported particulars of negligence attributed to the appellant in the plaint, because in the learned Judge's opinion had the appellant driven at a reasonable speed when approaching the junction, the accident may have been avoided; the impact caused was sufficient proof that the vehicle

was at a very high speed; the appellant tendered no evidence to support particulars of negligence attributed to the deceased; evidence of PW1 and 3 who were eye witnesses did not attribute any blame on the deceased; the appellant as the driver of a motor vehicle owed a greater duty of care to other road users than the cyclist. He should, therefore, have been on the lookout for other road users. His attempt to attribute any blame on the cyclist was rejected for failure to prove those particulars and to join the cyclist as a third party to the proceedings. The learned Judge ruled that he was bound by his pleading and rejected his assertion that it was the respondent who should have sought third party contribution from the cyclist. On the basis of the above assessment and reasoning, she affirmed the trial magistrate's finding that the appellant bore 100%.

Turning to quantum of damages, the learned Judge took into consideration the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another vs. Lubia & Another (No 2) [1985] eKLR**, and faulted the trial court on the approach taken when assessing the loss of dependency and expressed herself as follows:

**“In this regard, the trial magistrate ought to have estimated the deceased's income (Multiplicand) and estimated the years the dependants lost their dependency (multiplier). The product of the Multiplicand and the Multiplier would then be subjected to deductions to cover what the deceased would have used to meet his own needs and other personal financial obligations. As the deceased's age was advanced (59 years old), and he was self employed, he may have been in active business till the age of 70. Due to contingencies of life, a multiplier of 6 years would have sufficed in the circumstances of this case. PW4 produced bank deposit slips as proof that the father carried on business of saw milling and his earnings. Though logging had been banned, as the trial court observed, the deceased may have procured timber from elsewhere. The deposit slips were for the year 2006. In my view, the deceased earned some money and a multiplicand of 20,000/- would not be unreasonable. If the court had adopted a multiplicand of Kshs.20,000/- as proposed by the respondent and a ratio of two third as is usually the norm where the deceased had a family; the court would have awarded Kshs. 960,000/= on account of lost dependency. (20,000 x 6 x 2/3 x 12 = 960,000. In view of the foregoing, I find and hold that the Kshs. 1,000,000/= that the trial court awarded was neither too high nor too low to warrant interference by this court and the court will not interfere with that sum.”**

On the award under the **Law Reform Act**, the learned Judge expressed herself thereon as follows:

**“As the award under the Law Reform Act, would devolve to the same beneficiaries, the trial magistrate ought to have deducted that award from the total award to avoid a situation whereby the respondent would benefit twice from the same wrong. In respect of loss of expectation to life, the deceased was 59 years old and his expectation of life was not as long. I would have made an award of Kshs.80,000/-and I will sustain the award of Kshs.40,000/- on pain and suffering.”**

On special damages, the learned Judge expressed herself thereon as follows:

**“As concerns the award of special damages, I find and hold that the trial magistrate was justified in awarding the pleaded amount as a bundle of receipts totalling the pleaded amount was produced by consent of the parties. The disputed figures of Kshs.2000/-, 11,500/-and 5,000/- for expenses, food and photographs are not unreasonable. Besides the appellant having agreed to the production of receipts for the pleaded special damages without challenge cannot be heard to say that some of the pleaded damages were not proved as by law required.**

Based on the above assessment and reasoning, the learned Judge varied the trial court's award as follows:

Loss	of	dependency	-	1,000,000.00
Special damages	-	114,815.00		
			=	<b><u>1,114,815.00</u></b>
Less:	Pain	and	suffering	-
Loss	of	expectation	to	life
				-
TOTAL	=	<b><u>994,815.00</u></b>		

**The respondent will also have costs of the appeal and ½ of the costs in the lower court.**

Undeterred, the appellant is now before this Court on a second appeal raising eight (8) grounds of appeal subsequently condensed into three in his written submissions dated 23rd October, 2020. They may be paraphrased as follows:

**The learned Judge erred in law:**

**i) By failing to properly reevaluate and comprehend the evidence adduced on record on liability and thereby erroneously affirmed the trial court's findings on liability against the appellant.**

**ii) By misapprehending and misapplying the law on the assessment of quantum of damages thereby arriving at an erroneous award on loss of dependency and special damages.**

The appeal was canvassed virtually and through written submissions. Both learned counsel **Mr. Kisila** and **Mr. Walter Ochieng** appearing for the appellant and the respondent respectively, adopted their written submissions without oral highlighting.

Supporting the appeal, the appellant relied on the text by **P. S. Atiyah, Accidents, Compensation and the Law, 2nd Edition, at page 38, the case of Simpson vs. Paet [1952] 1 ALL ER 443, Sammy Ngingi Mwaura vs. John Mbugua Kagai & Gohil Soap Factory Ltd [2006] eKLR; and Patrick Mutie Kamau & Another vs. Judy Wambui Ndurumo [1997]eKLR**; and faulted the learned Judge for failure: to find that on the evidence adduced on the record, the respondent failed to prove that the appellant failed in his duty of care to the deceased as a road user resulting in the accident; to absolve him of any blame in the causation of the fatal accident after concurrently finding that negligence had not been proved against him through the evidence adduced on record; erroneously affirming liability based on strict liability and judicial notice without laying basis for such conclusion; failing to properly appreciate the undisputed evidence on record that the accident was caused after a motor cyclist who was overtaking a stationary lorry got into the appellant's motor vehicle's lane and in an evasive manner so as to avoid a head on collision with the motor cyclist, it swerved and veered off the road and hit the deceased; and failing to hold that the cyclist was to blame for the said accident in the circumstances.

Turning to the award of damages, the appellant relied on the case of **Kemfro Africa Limited t/a "Meru Express Services" & Another vs. A. M. M. Lubia & Another [supra]; Butt vs. Khan [1982 – 88] KAR 1; Nyambura Kigaragari vs. Agripina Mary Aya [1985]eKLR and Mwangi & Another vs. Ruth W. Mwangi [1997]eKLR; and Oshivji Kuvengi & Another vs. James Mohamed**

**Ongenge (suing as a representative of the estate of Samuel Ongenge) [2012]eKLR**, and urged the Court to interfere with all heads of damages as partially interfered with and affirmed by the learned Judge, and suggested an award of kshs. 10,000.00 as adequate compensation for pain and suffering for the deceased who died shortly after the accident; reduction of the award of kshs. 80,000.00 for loss of expectation of life which according to him was inordinately high in the circumstances considering that the deceased died at the age of fifty-nine (59) years and may not have lived long due to old age health problems and other life vicissitudes. He also urged the Court to interfere with the global award of kshs. 1,000,000.00, set it aside and substitute it with one that is commensurate to the loss suffered by the deceased's dependants, bearing in mind the deceased's age and remainder of apparent productive life.

The appellant further relied on the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013]eKLR**; the definition of "dependency" given in section 2 of the **Insurance (Motor Vehicle Third Party Risks) Amendment Act**; the cases of **Rose Munyasa & Another vs. Daphton Kirombo & Another [2014]eKLR**, and **Apollo Nyangayo Hongo vs. Kenya Bus Services Co. Ltd & Another [2006]eKLR**, in support of a proposed ratio of dependency of  $\frac{1}{2}$  especially when, according to him, there was no evidence tendered in court to demonstrate that the deceased spent  $\frac{2}{3}$  of his earnings on his dependants. Neither was it clear from the record as to why the learned Judge settled for the ratio of  $\frac{2}{3}$  as opposed to  $\frac{1}{2}$  which in the appellant's opinion, was the most appropriate in the circumstances of the case.

Turning to the choice of a multiplicand of six (6) years, the appellant relied on the cases of **Board of Governors of Kangubiri Girls High School & Another vs. Jane Wanjiku Muriithi & Another [2014]eKLR**; **Muthoni Mwanga vs. Peterson Wanjohi & Another [2004]eKLR**; and **Beatrice W. Murage vs. Consumer Transport Ltd & Another [2014]eKLR**, and suggested a multiplicand of two (2) years. It is also his submission that there was no proof of the deceased's income and he suggested an award of kshs. 10,000.00 as the deceased's lost earnings.

Lastly, on the award for special damages, the appellant relied on the case of **Hahn vs. Singh [1985]KLR 716**, and faulted the learned Judge for failure to uphold his objection to expenses claimed of Kshs.2,000, 11,500 and 5,000 allegedly incurred in respect of photographs, feeding and post mortem expense, respectively, for lack of proof.

In rebuttal, the respondent submitted that only two issues arise for determination, namely, whether the learned Judge failed to properly evaluate and comprehend the evidence on liability and thereby erroneously affirmed the trial court's pinning 100% liability in negligence against the appellant and, second, in making an excessive award on quantum of damages without evidential basis.

On the mandate of this Court, the respondent submits that being a second appeal, only matters of law fall for consideration and since all the eight (8) grounds of appeal raised by the appellant dwell on matters of fact, the jurisdiction of the Court should be declined.

On the merits of the appeal, the respondent urged the Court to affirm the concurrent findings of the two courts below on liability, because according to the respondent both the assessment and reasoning given by the two courts below for pinning 100% liability against the appellant were well founded on the facts on the record. Those facts pointed to the only logical conclusion arrived at concurrently by the two courts below that the appellant's motor vehicle not only never slowed down when it approached the junction, but was also driven at a high speed. That is why the imminent collision with the motor cyclist approaching from the opposite direction caused the appellant's vehicle to swerve, veer off the road and hit the deceased who was off the road.

Further, that appellant's attempt to exonerate himself from liability for causing the deceased's death was rightly rejected by the two courts below for his failure to prove particulars of negligence attributed to the deceased in his defence, and to seek contribution from the motor cyclist who caused him to swerve, veer off the road and then hit the deceased who was off the road.

On quantum, the respondent submitted that the learned Judge cannot be faulted on the approach she took as the same was based on principles that guide an appellate court in the exercise of such a mandate given that assessment of damages is a discretionary function. The trial court did not take into account irrelevant factors or fail to take into account relevant factors. Neither was there evidence that the award was inordinately too low or inordinately too high as to represent an erroneous award.

On the choice of a multiplicand of six (6) years,  $\frac{2}{3}$  dependency ratio and income, the respondent relied on the case of **Easy Coach Limited vs. John Thomas Akalongo & Another [2014]eKLR** and submitted that there is nothing on record to suggest that the decision arrived at by the learned Judge is so perverse as to warrant interference. According to counsel, the learned Judge's finding that the deceased was fifty-nine (59) years of age as at the time of his death and could therefore have been active in his business up to the age of seventy (70) years was well

founded, especially when PW4 sufficiently demonstrated that the deceased was engaged in the running of Kaptunga Saw Mills. Banking slips were also tendered in evidence as proof of his earnings from the saw mill, on the basis of which the learned Judge assessed kshs. 20,000 as his net monthly income.

It was also their submission that it was not contested that the deceased was a family man. He therefore had dependants. The choice of the dependency ratio of 2/3 was reasonable especially when it was the usual judicial practice for ratios in determining dependency where the deceased had a family. There was also PW2's unchallenged evidence that she was the wife of the deceased. They had twelve (12) children between them, four of whom were still of school going age and were therefore undoubtedly dependent on the deceased for support.

On the award for pain and suffering, the respondent argued that Kshs.40,000 awarded for pain and suffering was reasonable considering that the deceased died four days after the accident. He therefore suffered pain.

Lastly, on special damages, the respondent relied on the case of Easy Coach Limited vs. John Thomas Akalongo & Another [supra] in which the principle in Butt vs. Khan [1982 – 88] 1 KAR 1 and Idi Shabani vs. Nairobi City Council (1982 – 88) 1 KAR 68, was echoed and submitted that there is no basis for interference because: first, the request is an invitation to the Court to revisit the facts on record on this issue which according to them is outside the mandate of this Court. Second, there is nothing to suggest that the award is so inordinately high or low as to represent an entirely erroneous estimate. Nor is there any assertion that the same was based on a wrong principle.

This is a second appeal. In the case of Maina vs. Mugiria [1983] KLR 78 the Court held *inter alia* that; on a second appeal, only matters of law may be taken. In Kenya Breweries Limited vs. Godfrey Odoyo [2010] eKLR, it was held *inter alia* that: in a second appeal such as this one before us, we have to resist the temptation of delving into matters of fact. This Court on a second appeal confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

We have considered the record in light of the above mandate. In our view, only one issue falls for consideration in the determination of this appeal, namely;

**Whether the conclusions reached by the first appellate court both on inability and quantum are so perverse that no reasonable tribunal properly directing its mind to the evidence on the record could have arrived at such conclusions.**

Starting with findings on liability, it is common ground that the respondent's claim was directed at the appellant as the sole tortfeasor whose negligent manner of driving and or controlling his motor vehicle resulted in the death of the deceased for which he was called upon to pay compensation to the deceased's dependants. Particulars of negligence attributed to the appellant were as specified in the plaint. In rebuttal, the appellant also attributed negligence on the part of the deceased.

The two courts below considered the above rival positions and accepted the respondent's position as the plausible one and gave reasons for that conclusion. One of these was that it was supported by evidence adduced on the record through PW1 and PW3 who were described as eye witnesses. The trial court which had the benefit of observing the demeanor of these two witnesses who testified before it, believed their versions on how the accident occurred and gave reasons. The first appellate court reevaluated that position and affirmed it for reasons already highlighted above.

We, therefore, find no error in the concurrent findings of the two courts below in pinning 100% liability against the appellant which we accordingly affirm.

Turning to the complaint on quantum of damages, there are two limbs of this complaint. The first centres on the general principles the learned Judge ought to have applied in the exercise of the Court's mandate as a first appellate court confronted with a request to reevaluate an award of damages arrived at by the court below while the second deals with specific heads of damages. On the general mandate of the Court on assessment and reassessment of damages, the approach we take is that taken by the Court in the case of Butler vs. Butler [1984] KLR 225 for the holding *inter alia* that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge's findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision.

In the instant appeal, the exercise of that discretionary mandate is intertwined with the reasons given by the learned Judge for either interfering menially with the awards arrived at by the trial court or affirming the same. We therefore find it prudent to deal with these seriatim in the sequence dealt with by the learned Judge.

On the award under the **Law Reform Act**, it is not correct as contended by the appellant that the learned Judge allowed an award of kshs. 80,000.00 under this head. The correct position as borne out by the excerpt of that reasoning highlighted above is that the learned Judge is explicit on record as saying that had she been seized of that role (the role of assessing damages) under this head in the first instance, she would have allowed an amount of kshs.80,000.00. The learned Judge however did not substitute this amount with what the trial magistrate had assessed of forty thousand (kshs. 40,000) which was sustained.

On special damages, the guiding principles on assessment of damages under this head is as was restated by the Court in the case of Singh vs. Khan [supra] that firstly, these must be specifically pleaded with particularity and, second, they must also be strictly proved. It is common ground that these were specifically pleaded with sufficient particularity.

On proof, the parties tendered documents by consent. The record is explicit that the appellant neither raised objection to the production of the receipts for items he is now objecting to on second appeal which is not open to him, nor applied to cross examine the respondent on the same. This same complaint arose before the learned Judge who rejected it for reasons that the documents with regard thereto having been

tendered in evidence by consent the appellant could not be heard to complain about that procedure on appeal. Second, as correctly submitted by the respondent, this complaint relates to facts which do not fall for consideration on a second appeal. On pain and suffering, the learned Judge sustained the award of forty thousand (Kshs.40,000) because the deceased suffered pain for four days before he died. There is nothing to suggest that the award was either inordinately too high or too low. We find nothing to suggest that the learned Judge's exercise of discretion to affirm that award was erroneous.

Lastly, on the choice of a multiplier and multiplicand, we take it from the decision of the Court in the case of **Roger Dainty vs. Mwinji Omar Haji & Another [2004] eKLR** that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.

See also the case **Board of Governors of Kangubiri Girls High School & Another vs. Jane Wanjiku Muriithi & Another [supra]**, in which the Court approved the reasoning in the High Court case of **Cornelia Elaine Wamba vs. Shreeji Enterprises Ltd & Others [2012]eKLR** on principles that guide the Court on the choice of a multiplier or multiplicand, namely, that choice of a multiplier or multiplicand is a matter of the Court's discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere.

We have applied the above factors to the rival positions herein and find that the concurrent findings on the choice of multiplier, multiplicand and dependency ratio were well founded in law as they took into consideration the age of the deceased, nature of employment, earnings from the self-employed business of saw milling, probable length of time the deceased would have actively engaged in his business and pegged this at seventy years which we find reasonable. Lastly, the finding that the deceased had a family, a spouse with school going children was not disputed. He therefore, had dependants who were in law entitled to receive compensation for the loss of dependency.

The upshot is that we find no merit in the appellant's complaint on the manner that the learned Judge reassessed and only menially interfered with the trial court's assessment of damages. The appeal is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**