



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 33 OF 2014**

**BETWEEN**

**EASY COACH LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DANCAN WACHIRA MUNYUA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**ELIZABETH MUSONDI & JUSTICE OKWERO (SUING AS**

**THE LEGAL REPRESENTATIVE OF THE ESTATE OF**

**IGNATIUS OKETCH OMBARA ..... RESPONDENT**

*(Appeal from a Judgment and Decree of the High Court of Kenya at*

*Busia (L. Kimaru, J) dated 25<sup>th</sup> July, 2013*

**in BUSIA HCCC No. 3 OF 2008**

\*\*\*\*\*

**JUDGEMENT OF THE COURT**

Ignatius Oketch Obara (“the deceased”) died in a fatal road accident that occurred on 9<sup>th</sup> October, 2007 when a bus registration mark KAX 066S plunged into river Suo on the Busia – Kisumu road. That bus was owned by the 1<sup>st</sup> appellant Easy Coach Limited and driven by its driver the 2<sup>nd</sup> appellant Dancan Wachira Maina.

The respondents, Elizabeth Musondi and Justice Okwero suing as legal representatives of the estate of the deceased, took out a suit at the High Court of Kenya, Busia, claiming in negligence against the appellants for the death of the deceased and praying for special and general damages accordingly.

On 25<sup>th</sup> July, 2012 the parties recorded a consent order before the trial court where liability attached against the appellants at 100% and the plaint was amended to correct a prayer for special damages.

The suit was heard by L. Kimaru, J and in a judgement delivered on his behalf by F. Tuiyot, J on 25<sup>th</sup>

July, 2013 the respondents were awarded a sum of Kshs. 4,579,188/80 under The Fatal Accidents Act which was net of a sum of Kshs. 100,000/= awarded under The Law Reform Act. Kshs. 50,000/= was awarded for funeral expenses.

The appellants were dissatisfied with those findings and that provoked this appeal premised on the four grounds of appeal set out in the Memorandum of Appeal filed on behalf of the appellants by their counsel. In the first ground the learned judge is faulted for awarding damages that were excessive and so inordinately high as to be inconsistent with settled principles of awarding damages.

In the second ground the learned judge is faulted for adopting a multiplier of seventeen (17) years in respect of a deceased person who was 35 years old while in the penultimate ground the learned judge is said to have erred by failing to take into account the uncertainties and vicissitudes of life which he ought to have taken into account in discounting the multiplier.

The last ground of appeal faults the learned judge for giving an award which as a whole is said to be huge and excessive.

This is a first appeal and it is our duty to analyse and re-assess the evidence on record – See **Selle v Associated Motor Boat Company [1968] E A 123.**

Both appellants testified and the evidence adduced and which was uncontested was that the deceased, a graduate of Kenya Methodist University and holder of Bachelor of Business Administration, was at the time of death thirty five (35) years old and was a graduate trainee at Kenya Revenue Authority earning a net salary of Kshs. 34,405/80. The deceased had one wife the 1<sup>st</sup> respondent and they were blessed with four children - Faith Oketch aged thirteen years, Lydia Oketch aged eleven years, Gideon Oketch aged six years and the last born Meshack Oketch aged three years at the time the suit was filed.

Liability having been conceded by the appellants the issue before the learned Judge was assessment of damages. The learned judge considered the said age of the deceased at the time of death and gave a multiplicand of seventeen (17) years. He also found that dependency had been proved and gave a dependency ratio of 2/3.

Mr. Wekhomba, learned counsel for the appellants, in submissions before us submitted that the learned judge erred in considering a retirement age of sixty (60) years when the deceased, a civil servant, had died when retirement age in the civil service was fifty five years. On funeral expenses learned counsel faulted the learned judge for awarding a sum of Kshs. 50,000/= when the respondent had asked for Kshs. 30,000/= in written submissions. For these reasons he asked for the appeal to be allowed.

Mr. Otanga, learned counsel for the respondents, submitted that the learned judge did not consider any irrelevant factor or omitted to consider a relevant factor and thought that the judgement should be left undisturbed.

It was held by this Court in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & Anor v Lubia & Anor (No.2) [1987] KLR 30** that:-

**“The principles 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 to be that; it must be satisfied that either that 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 inordinate high that it must be a wholly erroneous estimate of the damage.”**

In the earlier case of **Butt v Khan [1981] KLR 349**, Law JA held that:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material**

**respect, and so arrived at a figure which was either inordinately high or low.”**

On the principles on which this court would disturb an award of damages made by a trial court see also **Kitavi v Coastal Bottlers Limited [1985] KLR 470; Shaban v City Council of Nairobi [1985] KLR 516 and Hassan v Nathan Mwangi Kamau Transporters [1986] KLR 457.**

This Court in **Roger Dainty v Mwinyi Omar Haji & Anor [2004] e KLR** held that courts in Kenya had not established as a matter of practice the appropriate multiplier for our jurisdiction to be applied to different age groups of victims of accidents. What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case.

The learned judge in the appeal before us considered that the deceased would have worked to sixty years as he was employed by Kenya Revenue Authority on permanent and pensionable terms. He awarded a multiplier of seventeen years as he stated:

**“All things being equal, it was expected that the deceased would have lived to a ripe old age. This does not however exclude the usual vagaries of life. No human being is certain for how long he will live on this earth. It cannot therefore categorically be stated that the deceased would have worked until he reached the retirement age of 60 years. Doing the best I can in the circumstance (sic) of this case, I will apply a multiplicand of fifteen (15) (sic) years...”**

Counsel for the appellants believes that the multiplier was so inordinately high as not to accord with other decided cases. Before the trial court the appellant submitted that a multiplier of ten years was reasonable while the respondents submitted for twenty years.

We have considered the record of appeal, submissions made before us and the law. The learned judge in the judgement appealed from considered that a multiplier of seventeen years was reasonable for a civil servant who would have retired at the age of sixty years and had therefore a good twenty five years of working life left. Even if we were to accept the submission by learned counsel for the appellants that the deceased died when retirement age for civil servants was fifty five years, that would still mean that the deceased had twenty years of working life left by the time he died.

We are of the considered opinion that the learned judge considered all relevant factors in reaching his decision on the multiplier and the multiplier applied was not inordinately high at all.

On funeral expenses counsel for the appellants faulted the learned judge for awarding Kshs. 50,000/= when this sum was not pleaded in the plaint and when the respondents in written submissions on record had asked for Kshs. 30,000/=.

We have perused the record and noted that the respondents did, indeed, submit for an award of Kshs. 30,000/= in written submissions before the said judge which sum was not pleaded in the plaint.

On funeral expenses the plaint merely stated:

**“Funeral expenses to be supplied at the hearing hereof.”**

Funeral expenses fall under special damages category and the law in Kenya is that special damages must be specifically pleaded and strictly proved. The respondents did not plead the sum awarded by the judge but produced documents to show that expenditure was incurred. Evidence was also led to show that a sum of Kshs. 80,000/= was utilized as funeral expenses.

Courts in Kenya have consistently departed from the general rule that special damages must be specifically pleaded and strictly proved when dealing with fatal accident cases. The courts have taken a view that families of bereaved persons spend money to bury their dead. In the case of **Jacob Ayiga & Anor v Simon Obayo Civil Appeal No. 167 of 2002 (ur)** this court awarded funeral expenses in the absence of production of receipts holding that:-

**“... A reasonable award ought to be made in respect of reasonable and legitimate funeral expenses.”**

We agree with learned counsel for the appellant that the learned judge erred in awarding a sum in excess of what the respondents prayed for. We are entitled to and do set aside that part of the judgement awarding a sum of Kshs. 50,000/= for funeral expenses and substitute thereof a sum of Kshs. 30,000/=.

Counsel for the appellants faulted the judgement because, on the multiplier, it is stated that:-

**“... will apply a multiplicand of fifteen (17) years...”**

Counsel thought that the multiplier used was not therefore clear.

This complaint has no merit at all. This is because the learned judge proceeded to work out the total sum awardable under that head and seventeen years was applied. The error was a clerical one and counsel should have written to the court under the relevant provisions of The Civil Procedure Act for correction of the obvious clerical error appearing in the said judgment. This appeal therefore has no merit and is dismissed save for our order in respect of the award in respect of funeral expenses. For the reason that the appellants managed to disturb the judgment to that extent only we award the appellant ¼ costs of this appeal while the respondents have ¾ of the costs. These, then, are our orders.

***Dated and Delivered at Kisumu this 5<sup>th</sup> day of February, 2015.***

**D. MARAGA**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original.

**DEPUTY REGISTRAR**