



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 108 OF 2008**

**PHILLIP MUSYOKA MUTUA.....APPELLANT**

**VERSUS**

**VERONICA MBULA MUTISO.....DEFENDANT**

(Being an appeal from the Judgment and Decree in Chief Magistrate's Court Civil Case No. 1099/2007 by Hon. S. Mungai, PM on 17/10/2008)

**JUDGMENT**

1. **Phillip Musyoka Mutua**, the appellant was sued by **Veronica Mbula Mutiso** as a legal representative of the Estate of **Lazarus Mutiso** (deceased) in Machakos CMCC NO. 1099 of 2007, (herein after "*the Respondent*").
2. On the 21st September, 2007, the deceased was traveling aboard motor-vehicle registration number KWZ 423 along Machakos, Kitui road which was involved in a road traffic accident whereby he sustained fatal injuries. The Respondent filed the suit claiming general and special damages under the Law Reform Act and Fatal Accidents Act.
3. The appellant denied ownership of the motor – vehicle, being vicariously liable for the accident and attributed negligence to the deceased.
4. The case was heard, the trial magistrate found the appellant liable for the accident. Judgment was accordingly entered. The Respondent was awarded Ksh. 757,200/= costs and interest thereon.
5. The appellant being dissatisfied by the Judgment of the court and a decree issued thereof appealed on the following grounds:-
  - i. The learned Magistrate erred in assessing general damages for loss of dependency at Kshs. 560,000/=, pain and suffering at Kshs. 20,000/=, and loss of expectation of life at Kshs.100,000/= which assessment when viewed against the evidence adduced, is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.
  - ii. That the learned Magistrate erred in law and in fact in holding that the Respondent had proved loss of dependency despite failing to provide evidence, including documentary proof in support of the deceased's earnings.
  - iii. The learned Magistrate erred in law in holding that the Respondent had proved dependency when indeed there was no evidence supporting dependency either as found by the learned Magistrate or at all.
  - iv. Without prejudice and in the alternative to ground 3 above, the learned Magistrate erred in law in adopting a dependency ratio of two – thirds which was wholly inappropriate given that the evidence adduced inferred a dependency ratio of one third.
  - v. The learned Magistrate erred in law and in fact in adopting a multiplier of seven (7) years bearing in mind that the deceased was much advanced in age (65 years), which finding is contrary and out of keeping with the evidence and other findings in similar circumstances.

- vi. The learned Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.
- vii. The said assessment and award of general damages is out of keeping with other Kenyan awards for comparable/similar fatal claims.
- viii. There was no good or proper basis for the said assessment of damages.

6. Both Counsels for the appellant and Respondent agreed to canvass the appeal by way of written submissions. It was the submission of Counsel for the appellant that the court having found the appellant 100% liable the damages assessed viewed against the evidence was inordinately high and excessive so as to amount to a miscarriage of justice. In a response thereto, Counsel for the Respondent argued that the appeal had no merit. He called upon the Court to dismiss it.
7. A perusal of the Memorandum of Appeal filed and submissions by the appellant's Counsel clearly show that the appellant does not fault the Learned Trial Magistrates findings on liability which was 100% against him. I will therefore proceed to determine whether the Learned Magistrate erred in assessing damages as set out in the grounds of appeal.
8. This being the first appeal, it is my duty to assess and re-evaluate the evidence adduced before the lower court, having not had an opportunity of hearing the testimony of the witnesses who testified. I must also ensure that the findings of the trial court on facts were based on evidence adduced pursuant to pleadings and the findings were based on sound principles of the law. (*See Peters - Versus- Sunday post (1958) EA 424 at pg. 429*).
9. Looking at the prayers sought on appeal, the appellant wants the judgment and decree set aside and/ or reviewed then the award of damages on the loss of dependency – set aside or in the alternative the dependency ratio of 1/3 be adopted in computing damages instead of 2/3. None of the grounds touch on the liability and special damages; though in his submissions. Counsel alluded to the issue of special damages. There being no contention in respect of the Trial Magistrate's finding on liability, I will proceed to address the issue of quantum of damages raised in the grounds of appeal.
10. With regard to damages awarded on the head of pain and suffering. The accident occurred on the 21st September, 2007 at 5.00p.m. It is not in dispute that the deceased did not die instantaneously. Per the testimony of PW2, **Stephen Kioko Musaa** who was in the ill-fated motor-vehicle with him, after the accident the deceased was taken to hospital. It is contended that deceased died instantly but there was no evidence to support that assertion. Having not died instantly is evidence that he suffered pain prior to succumbing to injuries sustained. I have perused **HCCC NO. 2004 of 1997- Nairobi, John Walter Namwaya – Versus- Joseph Koskei & Another** which was decided 10 years prior to the deceased's demise. Considering the time that has lapsed ever since, I find that the Trial Magistrate having not misdirected himself by awarding Ksh.20,000/= – on that head.

#### 11. Loss of expectation of life

In awarding a sum of Ksh.100, 000/- on this head, the Learned Trial Magistrate noted that the appellant had proposed a sum of Ksh.70, 000. They had relied on the **Namwaya** case cited above. The deceased despite his age was said to be going about his usual business. No evidence was adduced to suggest he was in poor health. A conventional figure of Ksh. 100,000/- was reasonable in the circumstances. I therefore find that the Trial Magistrate properly exercised his discretion based on evidence adduced before him. Consequently, I have absolutely no reason to interfere with findings of the Magistrate on the two (2) heads.

#### 12. Loss of dependency

The deceased was 65 years old, married with two (2) adult children. Per the letter from the area Chief they were aged 35 years and 30 years respectively. No evidence was adduced to establish if indeed they were dependants of the deceased. What is not in doubt is the fact he had a wife who solely depended on him. Having been married a multiplier of 2/3 was correctly applied by the trial court. The dependency ratio therefore stands at 2/3.

13. Evidence adduced by PW3, **Veronicah Mbula Mutiso**, the wife to the deceased was that the

