



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 2 OF 2014**

**URSULAR MULANDI.....APPELLANT**

**VERSUS**

**KYALO MUTUNGA & OTHERS.....RESPONDENT**

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

**Outline**

1. In this appeal the Appellant has faulted the trial court's judgment not on the finding on liability but only on the question of assessment of damages. The two grounds of appeal I find to be material are expressed as follows:-

**i.) THAT the learned trial magistrate erred in Law and in fact by computing an award for loss of dependency which was manifestly too high and excessive.**

**ii.) THAT the learned trial magistrate erred in Law and in applying wrong principles while assessing general damages under the Law Reform and Fatal Accidents Act and the decision therein being exorbitantly high and excessive in the circumstances.**

2. That position is informed by the fact that judgment on liability was settled by consent at 90:10% in favour of the plaintiff.

**Evidence at trial affecting award of damages**

3. PW 1 Manda Vonza, gave evidence that at the time of his death the deceased was aged 27 years and was gainfully employed as a chef with a monthly salary of Kshs.21,500.00 out of which he would send to the family Kshs.14,000 per month. He produced no document to evidence that salary but gave the deceased's dependent's as the father, wife, son and three (3) siblings.

4. On cross examination, the witness said the deceased used to work at Nandela Cafe. PW 2 was the deceased's widow, her evidence was largely a reinstatement of the evidence by PW 1 that the deceased worked and earned Kshs.21,500.00 of which he sent to her Kshs.18,000/=. She equally produced no evidence of earnings but said the deceased told her he earned that sum of money.

5. There is a list of documents by the plaintiff to be found at page 10 of the Record and copies of such documents at page 11-32. One of the documents so filed but to which none of the witness referred to and which is not apparent if was ever produced is a salary voucher from Mandela Food and meat supply showing the deceased earned wages of Kshs.7,500/= for the month of October 2011.

6. After the parties filed submissions and in a reserved judgment the trial court awarded to the Respondent the challenged damages as follows:-

**General damages for lost dependency - Kshs. 2,240,000.00**

**Pains & Suffering - Kshs. 20,000.00**

**Loss of expectation of life - Kshs. 100,000.00**

7. As said before it is the awards aforesaid which the Appellant now challenges to have been manifestly exorbitant and so high as to manifest an error in assessment of damages.

## Submissions by the parties

8. Both sides did file written submissions and attended court to highlight the same. The Appellant's submissions are dated 15/8/2016 and filed in court on the 23/8/2016 while those for the Respondent are dated 3<sup>rd</sup> November 2016 and filed in court on 7/11/2017.
9. During highlighting the Appellant was represented by Ms. Kagori advocate while the Respondent was represented by Ms. Kwaya. For the Appellant, Ms. Kagori narrowed down the grounds of appeal to a challenge on the award of general damages for lost dependency. In faulting the trial court the counsel attacked the trial courts choice of multiplicand, multiplier and dependency ratio as having been arbitrarily picked.
10. On the multiplicand, the advocate submitted that there having being no documentary evidence or indeed evidence from the employer or colleague on the monthly salary, the court was bound to adopt the then reigning minimum wage of Kshs.5,854 as per Regulation of wages and conditions of Employment, Regulations No. 63 of 2011.
11. On the multiplier, the counsel took the view that the deceased having been aged 27 at the time of death the courts choice of 28 years as the multiplier was onerous as there was cited to court a decision in *Kinyanyuni & Another vs Benard Wanjala* in which the High Court adopted a multiplier of 20 years for a deceased aged 26 years.
12. On dependency ratio the advocate submitted that the evidence given by PW 1 & PW 2 suggested that between the two the deceased sent home a total of Kshs.36,000 [nay 32,000] which was inconsistent with the alleged monthly income of Kshs.21,500.00. She urged the court to find the evidence on earning and dependency to have been not credible and prayed that the award be set aside and its place the court adopts a multiplier of 20 years, a multiplicand of 5,854 and a ratio 1/3. In her calculation the sum due would then work out in the sum Kshs.468,320.00.
13. For the Respondent Ms. Kwaya opposed the Appeal and pointed out that the evidence of PW 1 & PW 2 were consistent on the earnings of the deceased and further that a variation of Kshs.500/= was not a good basis to disregard, the otherwise cogent evidence of the people who lived with the deceased. She relied on the decision in *Jacob Ayiga vs Simeon Obaya [2005] eKLR* for the proposition that proof of profession and earnings must not be only by way of documents and that profession and earnings may be proved otherwise other than by documents.
14. Additionally, the counsel pointed out to court that the plaintiff had availed to court legal notice no. 71 of 2012 which came into effect on 1/5/2012 which to her persuaded the court to settle on a multiplicand of Kshs.10,000/-.
15. The decision in *Makube vs Nyamuro; Civil Appeal No. 8/1983 (unreported)* and *Savanna Sawmills Ltd vs George Mwale [2005] eKLR* for the proposition that an appellate court will not interfere with a trial court's discretion on assessment of damages unless it be proved that the trial court committed errors of principle and that the appellate court is not free to substitute its own award for that of the trial court merely because it would have awarded a different figure had it sat at trial.
16. On dependency ration the advocate submitted that both mother and widow gave evidence that both received money from the deceased. On multiplier, the counsel submitted that at the date of death the retirement age was 60 years and the deceased still had 33 years prior to retirement hence the choice of 28, years was modest regard being had to the fact that choice entailed judicial discretion vested upon the trial court. Reliance was then placed on the decision in *KIRATU MBUVI VS AUGUSTINE MUNYAO KIOKO [2006] eKLR* for the proposition that an appellate court will not interfere with assessment of damages unless it is inordinately so high or so low as to present an erroneous estimate grounded upon the trial court proceeding on wrong principles or outrightly misapprehending a material aspect of the evidence adduced.
17. For those reasons, the Respondent prayed that the appeal be dismissed with costs.

## Analysis and determination

18. This being a first appeal, the court proceeds by way of retrial. It has the duty to reappraise and re-examine the entire evidence and come to own conclusions. In doing so however, the court must appreciate that it lacks the benefit enjoyed by the trial court which heard the witnesses testify and observed their demeanor. See *Kemfro Africa Ltd vs Lubia & Another [1987] KLR 30*.
19. The duty is to scrutinized the record of the trial court and establish whether something went into the decision that ought not to have gone in or if there was a matter the court ought to have considered but it failed to consider. At the heart of the matter is that being a civil proceeding the onus rests upon the person alleging, to prove its allegations on a balance of probabilities.
20. For this appeal, that onus rests squarely upon the Appellant to prove and demonstrate that the award of general damages for lost of dependency was erroneously made.
21. Evidently, the trial court adopted the multiplier formula to calculate what the court considered a reasonable award to the Respondent. To apply that formula, the court had the discretion to choose a multiplier, a multiple and a dependency ration. That choice undoubtedly involve the employment and exercise of judicial discretion. As for all discretions, to remain judicious, it must be grounded upon reason and evidence or else it ceases to be judicious and becomes a whim or caprice. In coming to its choice of the multiplicand, the court said:

**“In my view, respectively the deceased seemed to work in the informal sector. This is so because he did not have any records. I am alive to the fact that the informal sector has employed a big number of the population and is also lucrative in**

**terms of earnings. What is evident in the instant case is that the deceased was working in Miritini and being a man, it was his duty to support and provide for the family. Doing the best I can and based on the foregoing I will give the deceased a random income of Kshs.10,000 per month”.**

22. With due respect, to the court it cannot escape the accusation by the Appellant that the choice of the multiplicand was arbitrary. Arbitrary because, while the plaintiffs witnesses insisted that the deceased earned Kshs.21,500.00 or 21,000.00 and the court having found that the figure was ‘flouted without any proof’ it was the court duty to give reasons for adopting the sum of Kshs.10,000 and not any other figure. Unfortunately no reason is put forth for the choice of Kshs.10,000/=.

23. This court proceeds for the standpoint that lack of documents to prove a profession and income by itself ought not defeat a claim for loss of dependency. Where the court is unable to lay its hands on proof of earnings, it is always prudent to resort the minimum wage guidelines. Indeed assistance was offered to court by the Respondent who exhibited to court a copy of Rulation No. 71 of 2012 of June 2012. Those guidelines provided minimum wages for a varied category of workers’ wages for various urban areas in Kenya.

24. On the pleadings and evidence offered including the salary voucher from Mandela Foods and Meat Supply, the deceased could be best described as a hotel worker not necessarily a chef which is a skill obtainable by training and certification upon qualification.

25. Based on such guidelines, I would consider the deceased to have been a waiter or a cook or an engagement connected therewith with monthly minimum wage of 9,257.65 in Mombasa, and not 19,360 as submitted by the plaintiff in the submission before the trial court. To that extent, I would set aside the figure for multiplicand of Kshs.10,000.00 and substitute therewith the sum of Kshs.9,257.65 per month. I have chosen to interfere with the trial court’s choice because, as said before, it was grounded on no reason as much as there was no justification at all not to use the minimum wage guidelines provided to court.

26. In *Nyamira Tea Farmers Sacco vs Wifred Nyabati Keruita [2011] eKLR*, the court said:-

***“In the absence of proof of income the trial court ought to reverted to the Regulation of wages....”***

Granted that the trial court exercised a discretion, that discretion without a basis is not judicious and subject to interference by the court sitting as an appellate court.

#### **Dependency ration**

27. It is well settled that dependency is a matter of fact subject to proof by evidence and there exists no convention of what a breadwinner in a family must devote the support of his dependants. Consequently a plaintiff seeking to be awarded damages for lost dependency is duty bound to give to the court some material to prove dependency. The evidence before the trial court was that the deceased did send some money home. Even though I have found that there was no cogent proof of how much he so sent, the fact is that he did offer some support to his family including a mother, wife and a child. Even without the proof of the portion of his earning he devoted for such support, I am alive and aware that the trial court had a duty and a discretion to do justice to the parties. Having exercise such a discretion, and on the established authorities when an appellate court would interfere with a trial courts decision, I am unable to find any ground to fault the trial court. I decline to set aside the choice of dependency ratio of 2/3. It shall stand.

#### **The multiplier**

28. It is not in dispute that the deceased was aged 27 years at the date of death. Even the choice of a multiplier is an exercise in discretion by the trial court. That discretion can only be reversed on the basis that is it openly erroneous. From the facts of this case, I find the choice of 28 years not to be exergenerated even though I would have adopted a slightly lower number of years had been the trial court. It is not in this appeal, open to me, as an appellate court, to freely and slightly substitute my discretion for that of the trial court. I find no justification to interfere with that aspect of the judgment.

29. The upshot is that the judgment of the lower court is only tinkered with to the extend of the multiplicand and the sum due therefore work as follows:-

$$9,257.65 \times 28 \times 12 \times 2/3 = 2,073,713.00$$

30. The Judgment of the trial court is therefore varied to the limited extent that the damages awarded under the heading **lost of dependency** in the sum of Ksh.2,240,000.00 is hereby substituted with a sum of Kshs.2,073,713. That sum shall attract interest from date of the judgment in the lower court till date of payment in full.

31. As the appellant has succeeded only to a very limited extent, I order that each party shall bear own costs of the appeal.

**Dated and delivered at Mombasa this 6th day of October 2017.**

**P.J.O. OTIENO**

**JUDGE**