



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 257 OF 2018**

**DORA MWAWANDU SAMUEL (Suing on her behalf and on behalf of the Estate of**

**SAMUEL MUWELIANI JUMAMOSI - DECEASED).....APPELLANT**

**-VERSUS-**

**SHABIR M. HASSAN.....RESPONDENT**

***(An Appeal from the Judgment and decree of Hon. E. K Makori, Chief Magistrate, delivered on 7<sup>th</sup> November, 2018 in Mombasa Chief Magistrate's Court Civil Case No. 643 of 2014).***

**JUDGMENT**

1. In the lower court, the plaintiff (appellant) sued the defendant (respondent) through a plaint dated 9<sup>th</sup> December, 1997. The appellant sued on her own behalf and on behalf of the estate of the late Samuel Muweliani Jumamosi (Deceased), seeking recovery of special damages, damages under the Fatal Accidents Act and the Law Reforms Act, general damages for pain and suffering, costs of the suit and interest.
2. The appellant averred that on or about 23<sup>rd</sup> August, 1995 the respondent and/or his agent drove motor vehicle registration number ARF 634, Leyland bus negligently at Bura Ndogo along Taita Taveta Road, causing it to violently collide with the deceased. That he was lawfully standing at a designated bus stop and the said collision occasioned the deceased fatal injuries.
3. The respondent was sued as the registered owner, driver and the insured of the said motor vehicle, which he was driving at the time the said accident occurred.
4. It was averred that the respondent was charged for causing death by dangerous driving vide Traffic Case No. 19 of 1996 in the District Magistrate's court at Taveta and fined Kshs. 25,000/= or 3 years imprisonment. The appellant further stated that by reason of the demise of the deceased, his estate suffered loss and damage. The deceased was said to have left behind eleven children who were all dependent on him during his lifetime.
5. The appellant stated that the deceased at the time of death was aged 59 years, that he enjoyed good health and was working as a horticultural farmer earning Kshs. 20,000/= per month and used to contribute substantially to the maintenance of his dependants. The deceased's life expectancy, dreams and plans for his family were also alleged to have been cut short. The appellant also pleaded special damages of Kshs. 20,900/=.
6. The respondent filed his statement of defence dated 12<sup>th</sup> June, 2015, where he denied the appellant's claim in its entirety. The respondent further averred that in the event the alleged accident occurred, then the same was overwhelmingly occasioned by the deceased's negligence.
7. In the lower court, Judgment was entered for the appellant against the respondent in the sum of Kshs. 400,000/= for general damages. The appellant was also awarded special damages of Kshs. 20,900/=, costs of the suit and interest at court rates.
8. The appellant was dissatisfied by the decision of the Trial Magistrate and she filed a memorandum of appeal dated 5<sup>th</sup> December, 2018 which was later amended on 21<sup>st</sup> January, 2019 raising the following grounds of appeal-

(i) That the learned Magistrate erred in law and fact by failing to make an award for pain and suffering before death as required under the law;

(ii) That the learned Magistrate erred in law and fact by failing to make an award under loss of expectation of life as required under

the law;

(iii) That the learned Magistrate erred in law and fact in failing to consider funeral and other related expenses;

(iv) That the learned Magistrate erred in law and fact by failing to make an award under loss of dependency as required under the law by failing to consider the age of the deceased, the earnings of the deceased and the particulars of dependency as pleaded in the plaint; and

(v) That the learned Magistrate erred in law and fact in failing to consider all the evidence and submissions on record.

9. The appellant's prayer is for this court to set aside the Judgment and decree by the Trial Magistrate and award the appellant compensation commensurate with the death of the deceased and for costs of the appeal.

10. The appeal was canvassed by way of written submissions. On 26<sup>th</sup> October, 2020, the law firm of L.N. Momanyi & Co. Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 18<sup>th</sup> November, 2020 by the law firm of Millimo, Muthomi & Co. Advocates.

11. The appellant's counsel in her submissions stated that she was only appealing on the basis of the quantum of damages rendered by the Trial Court. She further submitted that the award of damages was inordinately low hence warranting this appeal. Reliance was placed in the Court of Appeal decision in **Bashir Ahmed Butt v Uwais Ahmed Khan** [1982-88] KAR 5, on the issue of the discretion of the Trial Court in awarding damages.

12. The appellant's counsel submitted that the Trial Magistrate made an award based on the global sum principle despite the fact that the respondent did not adduce any evidence or call any witness in defence of his case. It was further submitted for the appellant that the Trial Magistrate did not base the said award on the law. The appellant's counsel placed reliance on the case of **Florence Mumbua Ndoe & Another (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & Another** [2017] eKLR.

13. She further submitted that the Trial Court failed to consider the provisions of Section 4 of the Fatal Accidents Act in his decision. It was also submitted that the deceased was the sole breadwinner of his family and his children depended on him, thus the Trial Court ought to take this into consideration.

14. It was also submitted that she called four witnesses three of whom testified of how they depended on the deceased who made a significant income as a farmer and was even able to support members of his extended family.

15. On the issue of quantum of damages, the appellant's counsel submitted that had the learned Trial Magistrate considered the authorities she adduced before the said court, he would not have proceeded to make an award based on a global sum, that was inordinately low.

16. The respondent's Counsel submitted that the circumstances of the case before the Trial Magistrate did not warrant the use of the multiplier formula as the deceased's earnings could not be established. It was further submitted that the multiplier approach ordinarily applies if the earnings of the deceased can be proved or in circumstances where the deceased's income is unknown, then the court bases the earnings on the minimum wage. The respondent's Counsel contended that in this case the minimum wage could not apply as the deceased was beyond the employment age.

17. It was further submitted that the deceased worked as a horticultural farmer earning Kshs. 20,000/= per month but on being cross-examined, PW1 indicated that the deceased only grew cotton and would hire out land at Kshs. 20,000/=. The respondent further submitted that PW3 testified that the deceased used to earn Kshs. 50,000/= from farming and that he used to keep cattle, hens and goats.

18. The respondent's Counsel submitted that the appellant failed to produce any documentary evidence or bank account statements to show the deceased's earnings before the Trial Court to prove the averments of the appellant's witnesses and therefore the Trial Court upheld the law by applying the global sum approach. It was submitted that applying the multiplier method would have led to an inordinately high award. Reliance was placed on the case of **John Wamae & 2 others v Jane Kituku & Another** [2017] eKLR.

19. The respondent's Counsel submitted that the appellant failed to prove dependency since only four of the eleven dependants were minors at the time the deceased died and as was stated by PW3 during cross examination, they were all adults who were fending for themselves at the time the lower court case was heard. The respondent's counsel relied on the case of **Fredrick Bundi Ruchia & another v S M M (suing as the legal representative of the estate of J M M)** [2019] eKLR, where it was held that dependency is always a matter of evidence and not a question of any conventional standards. It was the respondent's counsel's position that the learned Trial Magistrate was correct in applying the global sum approach.

20. The respondent's counsel submitted that the Trial Court's award of Kshs. 400,000/= was justifiable and this court should uphold the same. He urged this Court to bear in mind the age of the deceased and that the issue of dependency did not arise. It was stated that the accident occurred way back in the year 1995, that farming was a continuous business and that the farm was still in existence. Reliance was placed on the case of **Moses Wetangula & another v Eunice Titika Rengetiang** [2018] eKLR, where the court adopted a global sum of Kshs. 500, 000/= for a 42 year old retired officer of the Kenya Defence Forces and **Rishi Hauliers Limited v Josiah Boundi Onyancha** [2015] eKLR, where a global amount of Kshs. 500,000/= was awarded for a deceased who was 50 years old.

21. It was further submitted that special damages were to be proved by the appellant. Counsel for the respondent also stated that funeral expenses are costs actually incurred and are therefore special damages. It was further submitted that parties are bound by their pleadings and that the appellant had the duty to specifically plead and the burden to strictly prove and failure to do so disentitled her of the award of special

damages sought. The respondent urged this court to dismiss the appeal with costs.

#### ANALYSIS AND DETERMINATION.

22. I have re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel and the authorities relied on. This being a first appeal, the duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate the evidence adduced before the lower court and reach its own independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. These principles were well set out in **Selle vs. Associated Motor Boat Co.** [1968] EA 123, where it was held that:

*“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it 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 allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

23. This Court is not to interfere with the finding of fact by the Trial Court unless it is not based on evidence, or is a misapprehension of the evidence, or that the Trial Magistrate is shown to have acted on a wrong principle in reaching his conclusion. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu** (1982-88) 1 KAR 278.

24. The issue that arises for determination in this appeal is whether the court erred in applying the global award principle as opposed to the multiplier approach in awarding general damages. I have gone through the Record of Appeal and it is not in dispute that the deceased died at the age of 59 years. The accident happened on 23<sup>rd</sup> August 1995. It was claimed that the deceased was earning Kshs. 20,000/= from working as a horticultural farmer at the time of his death. PW1 stated that the deceased used to grow maize, cotton and other farm produce. In cross-examination, she stated that the deceased dealt with cotton and he used to earn Kshs. 20,000/=. When she was re-examined, PW1 stated that the deceased would hire out land for Kshs. 20,000/=.

25. PW3 on the other hand testified that during his lifetime, the deceased used to herd cattle, keep hens and goats and do other work. PW3 claimed that the deceased used to make Kshs. 50,000/= or so, per month.

26. It is noteworthy that no receipts and/or bank account statements were produced in support of the conflicting evidence about the deceased's earnings.

27. The question that this court now has to answer is which was the correct applicable principle in calculating general damages to be awarded to the appellant as a result of being found 100% liable by the Trial Court. I am guided by the decision in **Mwanzia Ngalali v Mutua Kenya Bus Ltd** cited in **Albert Odawa v Gichumu Githenji** [2007] eKLR, where the court stated as follows-

*“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 the 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.”*

28. In determining whether to interfere with the Trial Court's award, I am guided by the holding in **Butt v. Khan** [1981] KLR 349 per Law, J.A that:

*“An appellate court will not disturb an award of damages unless it is 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.”*

29. In **Moses Mairua Muchiri v Cyrus Maina Macharia** (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court stated as follows-

*“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”*

30. The court in the case of **Mary Khayesi Awalo & Another v Mwilu Malungu & Another** [1999] eKLR stated thus-

*“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 court's opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books”.*

31. In the case of **John Wamae & 2 Others v Jane Kituku Nziva & Others [2017] eKLR**, the High Court while sitting on appeal awarded a global sum of Kshs. 400,000/- for a 61 year old deceased, as the court found that there was conflicting evidence about his income.

32. The accident in this case happened way back in the year 1995 when the minimum wage was very low. Had the Trial Magistrate adopted the minimum wage applicable at that time, it is unlikely that the appellant would have been awarded the same amount she got in general damages.

33. In the Judgment delivered in the lower court, the Trial Magistrate stated as follows-

*“[12] I will agree with the defendants that this will not be a fit case to start calculating figures using multipliers, and multiplicands and dependency ratios based on the age of the deceased who was at an advanced age of 59 years, a global figure for general damages will do.....”*

*[13] Following the above decisions in this matter and the age of the deceased at the time of death and that all the alleged dependants are all mature, it will be an absurdity to adopt the multiplier formula in this matter. I will therefore adopt a global figure in the circumstances.”*

34. In this court’s understanding of the decision of the lower court, the global award took into account the element of pain and suffering as well as loss of expectation of life. Had it not been so, the Trial Magistrate would have specifically provided for the same.

35. In the appeal before this court, it is very evident that PW1, PW3 and PW4 testified that the deceased was a farmer but no documents were produced to support the deceased’s monthly income. I therefore uphold the decision of the Trial Court in applying a global award principle in this matter.

36. I confirm the global award of Kshs. 400,000/= made by the Trial Court. The award of Kshs. 20,900/= for special damages is also upheld, making the total sum of Kshs. 420,900/=. Costs of the lower court case are awarded to the appellant. Costs of this appeal are awarded to the respondent. The appellant is awarded interest at court rates until payment in full.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF FEBRUARY, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of –**

Mrs. Momanyi for the appellant

No appearance for the respondent

Mr. Oliver Musundi Court Assistant.