



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 106 OF 2017**

**OKIOKO AEPALEL.....1<sup>ST</sup> APPELLANT**

**AMBROSE ONGUNGI OGUNGI.....2<sup>ND</sup> APPELLANT**

**APHAEL GERALD OKOLLO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**SUSAN MASITSA.....1<sup>ST</sup> RESPONDENT**

**RONALD NGALA LIGARE (Suing on behalf**

**of the estate of FELIX SHANZIRA MUKOTO.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgment delivered by Hon. Ms Nyaloti, Chief Magistrate, in Nairobi on 17<sup>th</sup> February 2017 in Milimani CMCC No. 7212 of 2013)*

**JUDGMENT**

The Appeal herein emanates from the judgment of Hon. Nyaloti delivered on the 17<sup>th</sup> day of February, 2017, in Nairobi CMCC No. 7212/2013 in which, he entered judgment for the Plaintiffs/Respondents in the sum of Ksh.1,867,238/= plus costs of the suit. The Appellant being dissatisfied with the judgment filed the Appeal herein on the 10<sup>th</sup> March, 2017 in which they enumerated 8 grounds of Appeal which, can be broken down into the following grounds;

1) The learned magistrate erred in law and in fact by misapprehending the evidence and submissions on record hence using a wrong multiplier, multiplicand and ratio.

2) The learned magistrate erred in law and in fact in failing to take into account the principle on double enrichment when arriving at the award.

The issue of liability was agreed upon via a consent filed in court, in which, liability was apportioned at 70%:30% in favour of the Respondents and therefore, this Appeal is on quantum of damages only.

The evidence on record by PW2, one Susan Mositsa, the wife of the deceased, is that her husband died on the 9<sup>th</sup> April, 2013 in an accident. They had three child with the deceased namely;

· LM son – aged 17 years.

· DAM daughter – 15 years.

· LASM daughter – 9 years.

The deceased was a driver with Kenya Bus Services earning Ksh.20,000/= per month.

After the accident, he was taken to Kenyatta National Hospital where he died while undergoing treatment. He was buried in Western Province and she incurred burial cost, mortuary costs, post mortem costs other burial expenses amounting to Ksh.13,590/=. The deceased was 40 years old at the time of his death.

PW2 produced a letter from the assistant chief confirming that the deceased was her husband and that they had been blessed with three children. She also produced a driving licence and a certificate of achievement from the Kenya Bus Management Company for her husband.

The Appeal was disposed off by way of written submissions which this court has duly considered.

As pointed out earlier, the only issue before the court is that of quantum of damages. The principles that should guide an Appellate court in deciding an Appeal on quantum of damages awarded by a lower court, is whether the trial court took into account an irrelevant factor, or left out a relevant factor or that the amount is so inordinately low or inordinately high that it must be wholly erroneous estimate of the damages. See the case of **Kemfro Africa Limited –vs- Lubia & another (No. 2)1987 KLR 30.**

The same principles were also enunciated in the case of **Johnson Evans Gicheru –vs- Andrew Morton & Another C. A. No. 314/2000** in which the court stated;

**“it is trite that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”**

The Appellants contended that the Respondents failed to show the proof of earnings of the deceased and that no record was produced to show that the deceased was a driver with any particular company.

According to them, the trial court ought to have applied the regulation of wages (General) Amendments Order 2012 which provides that the class of the deceased P.S.V. commendation was entitled to a salary of Ksh.11,100/= per month. It was also submitted that the Respondents failed to prove dependency. They urged the court to award loss of dependency at Ksh.444,000/- using **Ksh.11,100 x 12 x 1/3 x 10.**

On their part, the Respondents submitted that the trial court took into account relevant factors in assessing the quantum of damages payable to the Respondents and that the amount awarded is not inordinately high as claimed by the Appellants. It was submitted that the deceased was a bus driver with Kenya Bus Services as evidenced by the driving licence and a certificate of achievement from KBS which was produced as exhibit 10. That, in absence of documentary prove, the trial magistrate correctly relied on the minimum wage rate applicable at the time of the deceased’s death as per Regulation of wages (General) (Amendment) Order, 2012 as at 9<sup>th</sup> April, 2013 under which a heavy commercial vehicle driver in Nairobi earned a minimum of Ksh.19,361/= per month and therefore, it was submitted, the Appellant’s submission that the minimum salary ought to be Ksh.11,000/= was without basis.

Both parties are in agreement that, there was no proof of earnings which is correct. No pay slip was produced or any other evidence to proof earnings.

In the premises, the Regulation of wages (General) Amendment Order 2012, as at 9<sup>th</sup> April 2013 is applicable which sets the minimum salary of a driver at Ksh.19,361 per month. The deceased died at the age of 40 and would have lived to work until the age of 60 years, the retirement age. He had a family of three children all relying on him and by his pre-mature death, they lost the financial support that they were getting from him. Taking into account the above the loss of dependency would be **Ksh.19,361 x 20 x 2/3 x 12**

**Making a total of Ksh.3,097,760/=.**

The learned magistrate awarded a total of Ksh.2,500,000/= under this head but he did not indicate the multiplicand and the multiplier that he used. The court however, notes that the Respondents did not cross Appeal against the damages awarded and therefore the court would have no basis to enhance the same. The other aspects of quantum of damages remain intact. As to the contention that the Respondents failed to prove dependency, in my view, the letter from the sub-chief is sufficient proof of the same. There is no evidence that the same was not authentic and in the circumstances, it suffices as evidence of the children that the deceased and PW2 have.

On the 2<sup>nd</sup> ground of Appeal, the Appellants contend that the court failed to take into account the principle of double enrichment. The answer to this ground, lies in the decision of the court of Appeal in **Nyeri Civil Appeal No. 22/2014 (Hellen Waruguru Waweru)** (Suing as the legal representative of Peter **Mwenja –vs- Kiarie Shoe Stores Limited & Company** in which the court of Appeal held that damages awarded under the Law Reform Act should not be deducted when the court makes an award under the Fatal Accidents Act.

In the end, the Appeal is dismissed with costs to the Respondents.

Dated, signed and delivered at **NAIROBI** this **20<sup>th</sup>** day of December, 2018.

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent



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