



**REPUBLIC OF KENYA**

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

**HCCA NO. 77 OF 2019**

**PETER WAINAINA.....1<sup>ST</sup> APPELLANT**

**JIMCAB SERVICES LTD .....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**LUCIA NDULU MUINDI PETER MULEI MUINDI**

*(Suing as Legal representatives to the Estate of*

**PATRICK MUINDI MAKULA (DECEASED) ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. E. Muiru (S.R.M) in Kilungu*

*Principal Magistrate's Court PMCC Case No. 103 of 2018*

*pronounced on 19<sup>th</sup> September, 2019).*

**JUDGMENT**

1. In a judgment delivered on 19<sup>th</sup> September 2019 the trial court decided in favour of the respondents (plaintiff in the trial court) against the appellants (defendants in the trial court) and awarded damages to the respondent with costs and interest, in the following terms –

**i. Claim under Law Reform Act**

- Pain and suffering Kshs.80,000/=
- Loss of expectation of life Kshs.100,000/=

**ii. Claim under Fatal Accident Act**

- Loss of dependency Kshs.500,000/=

**iii. Special damages Kshs.50,000/=**

**The award is subject to apportionment as held at the ratio 70:30 in favour of the plaintiff. The plaintiff shall also have costs of the suit and interest at court rates.**

2. Aggrieved by the decision of the trial court, the appellants (*who were the defendants in the trial court*) have come to this court on appeal on quantum of damages on the following grounds –

*1) The learned magistrate erred in fact and ended up misdirecting herself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards of deceased of closely related age.*

*2) The learned magistrate erred in law in making such a high award in loss of dependency as to show that the magistrate acted on a wrong principle of law.*

*3) The learned magistrate erred in law and fact by adopting a global sum on loss of dependency which was excessive.*

*4) That the learned magistrate award was made without considering the age of the deceased and failed to consider he was a farmer hence adopting a global sum that was speculative contrary to existing jurisprudence.*

*5) The learned magistrate erred in law and fact by adopting a global figure that was so high as to show that he acted on the wrong principle and failed to consider that the plaintiff did not plead and prove income.*

*6) The learned magistrate erred in law and fact by failing to consider the likely uncertainty in life in adopting the global figure and failed to note that the named dependants in the pleadings were adults.*

*7) The magistrate erred in law and fact in failing to take into account the award under the Law Reform Act and Fatal Accidents Act, hence ended up making a double compensation.*

*8) The award for loss of expectation of life and loss of dependency was excessive and not based on prevailing precedents.*

*9) That the whole judgment on quantum was against the weight of evidence before the court and without any consideration to the pleadings, appellants' submissions and evidence before the court.*

3. The appeal proceeded by way of filing written submissions. The appellants' counsel M/s Wangari Muchemi & company filed their submissions on 23/6/2021, while the respondents' counsel M/s Annie Thoronjo & company filed their submissions on 9<sup>th</sup> July 2021. I have perused and considered the submissions filed both for the appellants and the respondents.

4. This being an appeal on quantum of damages, I have to start by restating the principles on which an appellate court will consider a review of an award of damages made by a trial court. In the case of **Kenfro Africa ltd t/a Meru Express Service Gathogo Kanini –vs- A.M Lubia & Olive Lubia (1982) – 88 IKAR 727 at page 730 Kneller J. A** stated as follows -

*“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 by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the Judge, in assessing 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 inordinately high that it must be a wholly erroneous estimate of the damage.”*

5. Following from the above, I have to evaluate the evidence on record to determine if the trial court misdirected itself or considered irrelevant factors or did not consider relevant factors in determining the award of damages herein.

6. At the trial, both the respondents and the appellants tendered evidence through witnesses. The respondents, who were the plaintiffs, called 3 witnesses, while the appellants who were defendants called 1 witness.

7. For the respondents, Pw1 Daniel Vaati adopted his witness statement and was cross examined. He was not cross examined on

earnings or the type of injuries suffered by the deceased which caused the death.

8. Pw2 Peter Mulei Muindi, a mechanic in Nairobi, said that the deceased was his father aged 60 and a farmer with a wife and eleven (11) children. He testified that funeral expenses amounted to Kshs.117,690/=. He could not produce any documents on earnings and expenditure but maintained in cross-examination that one of the deceased's children was still in school.

9. Pw3 was Chief Inspector Joseph Nyasili who produced a sketch plan of the scene of accident where the deceased was injured and died.

10. For the appellant, Dw1 Peter Wainaina Muhoro (1<sup>st</sup> appellant), testified that he was the driver of the accident motor vehicle. He admitted the occurrence of the accident but testified that the deceased was to blame for the accident, and his subsequent death.

11. I note that, in the judgment after evaluating the evidence on record, the trial court apportioned liability as 70:30 between the appellants and the respondents as no consent on liability was recorded.

12. The trial court also found that the age of the deceased was 65 years at death and that the last born child was 18 years, and awarded a global sum of Kshs.500,000/= for loss of dependency. This award has been challenged on appeal. Though the appellants have challenged that award, in my view, that figure of award is reasonable as it would only mean that the deceased earned about Kshs.8,000/= a month for five (5) years up to 70 years. In my view also, dependency is not restricted to minors. Even adults can be dependants depending on the facts and circumstances of each case.

13. With regard to loss of expectation of life, the court awarded Ksh.100,000/= and, relying on the case of **Put Sarejevo General Engineer Co. Ltd –vs- Esther Njeri & Others – Muranga High Court Civil Appeal No. 225 of 2013**, declined to deduct this amount from the amount awarded under the Fatal Accidents Act. In my view, though the appellants claim that there must be a mathematical deduction of the amount, under the two Acts, that is not the position and each case has to be considered on its own facts, and be guided by the perceived unfair benefit to the estate. In the present case, I do not see any unfair benefit conferred on the estate of the deceased from the award of the trial court, thus in my view there was no need for such deduction.

14. With regard to the award for pain and suffering, the figure determined was Kshs.80,000/=. The magistrate also awarded Kshs.50,050/= as special damages. All these awards in my view were not inordinately high, and were in any case to be subjected to the 70:30 liability ratio.

15. Following from the above, in my view, though the appellants have come to this court on appeal claiming that the trial court's award of damages is excessive, there are no factors demonstrated by them of such excess to justify this court to interfere with the amount of award. Also the fact of children of the deceased being adults, alone does not mean that there can be no dependency, as a wife and even adult children, can still be dependants, and the award for dependency herein cannot thus be faulted. I will thus dismiss the appeal. For the sake of clarity however, the magistrate should in my view have given the net figure of award after applying the 70:30 liability ratio, but that omission was not a substantive error that can affect the trial courts decision.

16. Consequently, I find no merits in the appeal. I dismiss the appeal with costs to the respondent.

**DELIVERED, SIGNED & DATED THIS 23RD DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**

**JUDGE**



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