



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E094 OF 2021

NAMAN KAILIBI MEME..... APPELLANT

VERSUS

M'NCEBERE M'EKOTHA (Sued as the legal administrator of the estate of

FN-Deceased).....RESPONDENT

(An appeal from the Judgment and Decree of Hon. T.M Gesora (C.M) in Maua CMCC No. 14 of 2020 delivered on 24/6/2021)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 16/1/2020 in which the respondent sued the appellant and sought special damages and general damages under Fatal Accidents Act as well as costs of the suit plus interest.
2. The gist of the claim was that on or about 18/9/2019 at 1300 hrs, the deceased was a pedestrian carefully walking along Maua- Mikinduri Road when at Athi market, the appellant and/or his appointed driver/employee so negligently and carelessly drove Motor Vehicle Registration No. KBL 431 D Isuzu Lorry that it was permitted to veer off the road, knocked the deceased down thereby occasioning her fatal injuries. It was pleaded that on the date of the accident, the deceased was in good health as she was only 52 years and she supported her family financially, morally and socially. By reason of her death, her family lost the said support and her estate suffered loss, expense and damage.
3. The parties recorded a consent on liability at the ratio of 80:20 in favour of the respondent against the appellant and the matter proceeded for assessment of the damages payable. Accordingly, since liability had been removed from contention, only the respondent (as plaintiff then) gave evidence in proof of the damage and its measure.
4. The respondent adopted his witness statements dated 17/1/2020 and 17/2/2021. He stated that the deceased was in the business of selling cereals in Kiengu market and used to farm the same in her land in Kiutine then sell to Kiengu residents. She sold at least 4 sacks of maize and beans every week and earned a weekly sum of approximately Kshs 20,000 from the sales hence as a result of the accident, her estate suffered loss, expense, damage and her family loss her financial, moral and social support. He produced demand notice plus its receipt, limited grant Ad litem plus court fees receipt, post mortem report plus its receipt, death certificate, receipts for funeral expenses, police abstract and chief's letter as exhibits to support his case. Upon cross-examination, he stated that the deceased was his daughter. The deceased was not married but she had children, whom they forgot to mention.
5. After the conclusion of the trial, the trial court found that the respondent had proved his case and awarded him a global figure of Ksh. 2,000,000 for loss of dependency, Ksh.100,000 for loss of expectation of life, Special damages of Ksh.201,500 the subjected the awards to the agreed 20% contribution and thus computed the net damages to be Kshs 1,881,500.
6. Aggrieved by the said decision, the appellant filed the Memorandum of Appeal herein on 22/07/2021 setting out five (5) grounds of appeal. A proper reading of the grounds reveals the appellant's complaint to be two pronged; that the trial court awarded a wholly erroneous global award of Ksh.2,000,000 for loss of dependency, without any evidence in support of the dependency of any deceased beneficiaries and in respect of a 52 year old lady, whose income was unascertainable, instead of adopting the minimum gazetted wages and a dependency ratio, if any; and that the trial court erred in awarding special damages that had not been strictly proved.

Submissions

7. Upon the directions by the court, the parties filed their respective submissions to the appeal on 2/11/2021 and 22/11/2021. The appellant faults the trial court for awarding inordinately high sum of Kshs 2,000,000 for loss of dependency without considering the age of the deceased, which amounted to a wholly erroneous estimate of the damage suffered by the respondent. He submitted that the trial court ought to have taken into consideration the award for loss of expectation of life when making the award for loss of dependency, which was not done

and further that no basis was laid before the trial court on which such a high sum could be made. He urged the court to be guided by *Anthony Konde Fondo & anor v RMC (The Representative of FC-Deceased) (2020)eKLR and M'Ituamka M'Marambei (Suing as the legal representative of the Estate of Peter Miriti v Board of Management - Miathene High School [2020] eKLR* and review the award for loss of dependency downwards to a reasonable figure. It is noted that the said decisions were just thrown at the court without regard for the need to point out what principle its sought to be relied upon. This, I think, is a practice that is gaining currency in this registry and must be discouraged. A party citing a decision has the duty to point out what part of the decision he seeks to rely on and the principle of the law therein contained. It is wrong to just cite a decision, on occasion a good number of them without pinpointing where the reliance is sought.

8. On the second prong, it was submitted that the claim for burial expenses amounting to Kshs161,000 was not proved, and urged the court to find so and set aside the award.

9. For the respondent, submissions were offered to the effect that the award for loss of dependency was made in comparison to other relative awards. He submitted that the deceased had 3 school going children, as introduced by the chief's letter, who fully depended on her. He submitted that the deceased life was obliterated (sic) during her active years, as she was a very vibrant farmer and a business lady, who was not due to retire anytime soon. He submitted that although the deceased made a lot of income, the global sum approach as applied by the trial court was justified, and he cited *Albert Odawa v Gichumu Githenji (2007) eKLR* in support of that position. He also relied on *Eston Mwirigi Ndege & anor v Patrick Gitonga Mbaya(2018)eKLR and Ainu Shamsi Hauliers Limited v Moses Sakwa & anor(suing as the administrators of the estate of Ben Siguda Okach-Deceased)(2021)eKLR*, where the global sum approach was applied. He submitted that special damages were specifically proved by way of receipts, and thus properly awarded by the trial court. He prayed for the dismissal of the appellant's appeal with costs and the trial court's judgement to be upheld.

Analysis and Determination

10. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*.

11. It is clear that the determination of the appeal spins around the two questions whether the award of Kshs 2,000,000 for loss of dependency was excessive and whether the special damages awarded was proved.

12. The evidence by the respondent was that the deceased was a farmer and a business lady, growing and selling cereals and would earn a weekly income of at least Kshs 20,000. She enjoyed good health, which was abruptly cut short by the appellant's negligence. In cross-examination, the appellant's counsel focussed only on the age and the dependents of the deceased, and not on her income.

13. In the judgment, trial court observed that:-

“the deceased was a farmer and farming in this area has high returns. The award should be commensurate with the kind of support the plaintiff and her child got from her.”

14. I would not wholly agree with the trial court that what was asserted by the respondent in evidence, having not been contested, challenged or controverted, stood as the truth and the court had no otherwise but to rely on it. A court of justice ought not to be led into a trap of giving a decision that is illogical even if it is to be by concurrence of the parties. In this matter if the weekly sum was to be taken wholesome, then it meant that the deceased had a steady income of Kshs 80,000 per month, throughout the year whether within or out of season. That is most improbable. In any event, such an income would attract production and trade expenses that must be taken into account but were never taken into account. I take notice that Meru County has two harvesting seasons for the disclosed cereals. The court, therefore, finds that the deceased had some income and that such was not necessarily Kshs 20,000 per week. In addition, dependency is a matter of fact to be proved by evidence. The record bears nothing on the extent the plaintiff depended on the deceased.

15. I note that nowhere in the pleadings and in his examination in chief did the respondent state that the deceased had children yet it was his duty to plead the particulars of such dependants if the action was brought on their behalf. It is not enough that the letter from the chief named the children. The letter from the chief could only be evidence to be adduced in support of a pleading filed. The casual assertion during cross examination that, the deceased was his daughter aged 52 who was not married but had children who he forgot to mention in the plaint was thus a *by the way* and evidence led contrary to the pleadings filed.

16. However, a reading of the plaint at paragraph 4 makes it evident that the action was brought by the respondent on his own behalf and as a personal representative and a dependant of the deceased. That essentially made the need for particularising the dependant not mandatory. Accordingly, I do find that even though the appellant did not challenge the deceased weekly income alleged at Kshs 20,000 per week, that was a gross income blind to the cost of production and incidental expenses involved in the sale of the produce. There was however no evidence of dependency by the children as alluded to by the trial court.

17. To this court that was not a net income to be employed as the multiplicand. In my finding, in the absence of cogent evidence on income, the court was bound to employ the global sum approach, which then should have had in mind probable or approximate monthly income. To the extent that the court was swayed with an income I view to have been too high and not realistic, I find that there was a commission of an error in principles of assessment of damages, which resulted in the award being too high on the face of the facts revealed, for which this court is entitled to interfere. I therefore do interfere by setting aside that award even though I retain the global sum approach. In setting aside, the award, I do take into account the age of the deceased and the fact that only the respondent, being her father was the only disclosed beneficiary and also personal representative to whom both limbs of award would go to. Having taken into account that the award under the two statutes would go to the respondent, I do substitute the award of the trial court with an award of Kshs 800,000 for general damages for loss of dependency.

18. On the award for special damages, I have looked at the receipts on record and produced with concurrence of the appellant. The receipts read as follows: -

- a. Demand notice Kshs 5,000
- b. Burial expenses Kshs 161, 000
- c. Copy of records Kshs 500
- d. Misc succession legal fees Kshs 35,000

19. I total the sum to be and find that the sum of Kshs 201,500 was duly pleaded and proved as special damages. That is the sum the court was bound to award as it did and therefore I discern no error that would entitle the court interfere.

20. The upshot from the foregoing findings and conclusions is that, the award for loss of dependency made by the trial court is set aside and substituted with an award of Kshs 800,000.

21. The limb of the appeal on special damages lacks merit and is dismissed. The appellant having succeeded only in part is awarded one half of the costs of the appeal

22. For the avoidance of doubt, the awards are subject to the agreed contribution. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Muriera for the appellant

N/A for the respondents

PATRICK J.O OTIENO

JUDGE