



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 39 OF 2020

ANTONY NJOROGE NG'ANG'A (Legal representative of the

Estate of the late FRED NGANGA NJOROGE A.K.A

FRED NG'ANG'A NJOROGE).....APPELLANT

VERSUS

JAMES KINYANJUI MWANGLI.....1ST RESPONDENT

JAMES KIMANI.....2ND RESPONDENT

STEPHEN NGUGI NJOROGE.....3RD RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT/DECREE OF HON. J.B KALO

(CM) DELIVERED ON 24TH FEBRUARY 2020 VIDE NAKURU CMCC NO. 911 OF 2018).

JUDGEMENT

1. This appeal arises from an accident that occurred on 27th September 2018 involving the motor cycle registration number **KMCQ 537W FOCIN** and motor vehicle registration number **KBA 630W** Toyota Matatu. The plaintiff sued in his capacity as a legal representative of the estate of his deceased father **Fred Nganga Njoroge a.k.a Fred Ng'ang'a Njoroge** who died in the said accident.

2. The deceased was a passenger aboard the said motorcycle and it was averred that the said motor vehicle was being negligently driven along Subukia- Nakuru road near Miki Hills School rammed into the said motorcycle as a result the deceased herein was occasioned fatal injuries and consequently died.

3. The matter proceeded to its conclusion where the court rendered its judgement. The parties agreed on liability whereby the defendants shouldered 90% liability and the plaintiff 10% liability. On quantum the court awarded Kshs. 10,000/= for pain and suffering, Kshs. 50,000/= for loss of expectation of life, Kshs. 200,000/= as a global award for loss of dependency and Kshs. 88,000/= for special damages.

4. The appellant who was the plaintiff in the original suit, being aggrieved by the judgement of the trial court, has filed a memorandum of appeal under the following grounds;

a) That the learned trial magistrate erred in law and in fact by not properly analyzing and or considering the materials/evidence on record while arriving at his decision/judgment on quantum and damages awardable.

b) That the learned trial magistrate erred in law and fact in reaching his finding/award on damages that is not based on proper evaluation and Consideration of the pleadings, evidence on record, submissions and the applicable law and principles for award of damages.

c) That the learned trial magistrate erred in law and in fact by reaching a decision on quantum which is not supported by the pleadings, materials, evidence and or submissions on record

d) That the learned trial magistrate erred in law and in fact by awarding Damages - for Pain and suffering, Loss of expectations of Life and Loss of Dependency/Lost years that were manifestly, obviously and so inordinately low and not in tandem with /supported by the materials, evidence and or submissions on record.

4. Parties were directed to canvass the appeal by way of written submissions when the same came up for directions.

Appellant's Submissions

5. The appellant submitted that the award of Kshs. 10,000/= for pain and suffering was not based on proper evaluation of evidence, parties' submissions and all materials on record and was manifestly low. That the learned magistrate erred on the finding that evidence was tendered to the effect that the deceased died on the spot. The appellant submitted that there was no such evidence on record and that as per the death certificate the deceased died on 28th April 2018 while the accident occurred on 27th April 2018.

6. The appellant submitted that the mistake/misapprehension as to when the deceased died amounted to an error of principle which entitles this court to interfere with the said award. That in most recent authorities, awards of between kshs. 20,000/= upto Kshs. 100,000/= have been given where the deceased died on the spot or immediately. That further, in his opinion that an award of Kshs. 120,000/= would suffice as adequate compensation. He draws the court's attention to the cases of **Balder Kaur Mann v Robert Bilindi Wekalao [2006] Eklr**, **Abdimana Abdimana & Another v G S M (Suing as legal Administrator of the Estate of the Late S W N [2018] eKLR**, **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another, Acceler Global Logistics v Gladys Nasambu Waswa & Another [2020] eKLR**, **Beatrice Nyanchama Obuya v Hussein Diary Limited [2010] Eklr** and **Sophia Wairimu Njoroge & Another v George Karango & Another [2017] eKLR**.

7. The appellant went on to submit that the learned trial magistrate awarded a sum of Kshs. 50,000/= for loss of expectation of life, which award was not based on proper evaluation of evidence, parties' submissions and all material on record and was manifest low. That the learned trial magistrate did not give reasons or rationale of how and why he arrived at the said amount. That further, several decided cases have given higher awards where the deceased died aged more than 64 years. The appellant submitted that an award for Kshs. 150,000/= would suffice as adequate compensation. He placed reliance on the cases of **Eastern Produce (K) Limited (Kapsumbaiwa Tea Estate) v Stephen Inyasa Makhaya [2019] eKLR** and **Philip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR**.

8. On the award for loss of dependency, the appellant submitted that the global award by the trial magistrate of Kshs. 200,000/=, was not based on proper evaluation of evidence, parties' submissions and all the materials on record and the same was manifestly low. That trial magistrate made an erroneous finding to the effect that the plaintiff testified that he had employed the deceased in his business and was paying him Kshs. 60,000/= per month but did not produce any employment records nor proof of the deceased earnings. That further, the deceased's business certificate of registration, his educational certificates/testimonials and copy of daily construction inspection report by Subnak Building works (where the deceased both sons were supervisors) were produced in evidence as Pexh B, 12 and 14 respectively by consent of all parties.

9. The appellant submitted that an award of Kshs, 3,840,000/= or thereabout would suffice as adequate compensation if the court adopts the multiplier approach. He placed reliance on the following cases; **Kipkebe Limited v Dismus Nyangau Omaiyo [2011] eKLR**, **Tononoka Rolling Mills Limited v Jackson Wambua Nzioka [2019] eKLR** and **Mary Njeri Murugi v Peter Macharia & Another [2016] eKLR**.

10. In conclusion, he urged the court to allow the appeal and the judgment/decree of the lower court be revised, reviewed and/or set aside. That costs of the appeal be borne by the respondents.

Respondents Submissions

11. The respondent submitted that the award of Kshs. 10,000/= for pain and suffering was totally sufficient given that the deceased died on the spot. The appellant submitted further, that no birth certificates were availed to show parenthood and that no proof was adduced on how the dependants relied on the deceased and to what extent. While placing reliance on the case of **Dismas Muhami Wainarua v Sopon Kasirimo Maranta (Suing as administrator and or personal representative of the estate of Partinini Supon (deceased) [2021] eKLR**, the appellant submitted that dependency was a fact that should be proved by evidence.

12. The respondent submitted further that the appellant relied on the multiplier approach in their submissions yet based on the lack of dependency and the plaintiff's ability to fend for himself much like the other persons listed as dependants a global sum of Kshs. 200,000/= was fully sufficient. He placed reliance on the case of **Marko Mwenda v Bernard Mugambi & Another NBI HCCC No. 2343 of 1993 as quoted in Alfred Kaingu Nguwa v Ali Dzivo Saha & Rehema Ali Dzivo (both suing on behalf of the estate of Rashid Joha Dzivo (Deceased) [2020] eKLR**.

13. In conclusion, the respondents submitted that in the interest of justice, the global sum awarded by the trial magistrate should be maintained. They urged the court to dismiss the appeal with costs in their favour.

Analysis and Determination

14. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally”.

15. In addition to this, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. This was the position of the Court of Appeal in **Municipal Council of Nakuru & another v David Mburu Gathiaya [1993] eKLR** which cited with approval the case of **Butt v Khan [1982-88] KAR 1**, where it was held as follows: -

“An appellate court will not disturb an award for 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”.

16. I have carefully examined and considered the Record of Appeal, the grounds of appeal and the submissions by the parties and the issue for determination is on quantum as liability was already settled by the parties that is 90% on the respondent part and 10% on the appellant part.

17. On the facts of the case, **PW1 ANTONY NJOROGI NGANGA** testified that the deceased was his father and that he filed a witness statement dated 11th August 2018 which he adopted as his testimony. He made reference to the documents produced as P exh.13, the certificate of death marked P MFI 4 and the Certificate of business registration P MFI 7 and P exh.14.

18. He testified further that the deceased was a contractor and was making kshs. 60,000/= per month. PW1 added that he was his supervisor hence he knew how much he was making. That the name of the deceased's business was Subnak Contractors. He went on to testify that the deceased died at the age of 64 years and that he had employed PW1 and his brother John as supervisors in the said business. PW1 testified that Susan Wambui and Samuel Mwangi depended on the deceased because they are unemployed and were residing with the deceased. That the deceased fed, clothed them and he was paying them kshs. 30,000/= per month each. He prayed for compensation as per the plaint.

19. On cross examination, he testified that he did not have any document to show that the deceased was earning kshs. 60,000/= per month and that the deceased was paying taxes. He testified that their last born was 28 years old and that he was 42 years old. He confirmed that he could be gainfully employed. He confirmed that he did not have any document to show the deceased was paying him Kshs. 30,000 per month.

20. Upon re-examination, he testified that the deceased's business documents were lost when he died and that he was being paid cash by the deceased. He testified further, that their lives had changed following the death of their father and their earnings had drastically reduced.

21. The appellant contention are as follows; firstly, that the award of Kshs. 10,000/= for pain and suffering was not based on proper evaluation of evidence, parties' submissions and all materials on record and the same was manifestly low. In **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR** the court observed that-

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

22. In view of the above cited authority it is clear that when death followed immediately after the incident very nominal damages should be awarded. The plaintiff submitted that the deceased died on 28th April 2018 while the accident occurred on 27th April 2018. The same is proved by the death certificate which was admitted into evidence by both parties' consent. The respondent on their part, argued in their submissions that the said award was sufficient given that the deceased died on the spot.

23. From the foregoing, it is evident that the deceased did not die immediately after the accident but a day after and thus he must have endured pain and suffering before he lost his life. In the case of **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, the Court stated as follows-

“As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” (emphasis added).

24. In view of the above decisions and bearing in mind that this court has been invited to exercise its discretion when considering the award made by the Trial Court, I find that the award made in the sum of Kshs. 10,000/= for pain and suffering was excessively low. I note that the appellant's evidence in the lower court was unchallenged. I would therefore review the said award to Kshs. 30,000/= which in my opinion is sufficient and within the required range as stipulated above.

25. Secondly, the award of the sum Kshs. 50,000/= for loss of expectation of life was not based on proper evaluation of evidence, parties' submissions and all material on record and was manifest low. From the evidence on record it is noted that the appellant in their submission sought to be awarded Kshs. 150,000/= under this head. In the instant appeal, the appellant in his submission is seeking for Kshs. 120,000/=. However, comparing it with the cited case of **Hyder Nthenya Musili & Another** (supra), where it was held that the conventional award for

loss of expectation of life is Kshs. 100,000/= i set aside the award of Kshs. 50,000/= issued by the lower court and in its place award Kshs. 100,000/=.

26. Lastly, that the global award by the trial magistrate for Kshs. 200,000/= for loss of dependency, was not based on proper evaluation of evidence, parties' submissions and all the materials on record and the same was manifestly low. I note that the trial magistrate in issuing a global award gave reasons that prove of employment and income for the deceased was not produced in court. I note further that PW1 in his evidence admitted to not having any documents proving the same and that they had gotten lost.

27. It's my view that the appellant should have established his claim that the said documents had misplaced/lost as is required in law. The fact that there was no proof of the deceased's monthly income left no other option for the trial court but to award a global sum. In this regard the court in **Albert Odawa vs. Gichimu Gichenji [2007] eKLR**, cited with approval the case of **Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another**, where **Hon. Ringera, J** took the view that:

“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. This reasoning was adopted in **Mary Khayesi Awalo & Another - Vs- Mwilu Malungu & Another ELD HCCC NO. 19 of 1997 [1999] eKLR** where Nambuye J., stated that: -

“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 courts 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.”

24. In view of the above, the court finds the award of Kshs. 200,000/= was manifestly low. I therefore set it aside and an award Kshs. 400,000/= which will adequately compensate the appellant. See the case of **Albert Odawa (Supra)**, where the court held as follows:

“On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased's earnings and thus the multiplicand of Kshs. 8,100/= was without basis.....in the circumstances, I would consider the global award for the loss of the dependency and give a global sum of Kshs. 400,000/=.”

25. Similarly, in **John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR**, the court held as follows:

“It is therefore not clear as to what the deceased did for a living. In my view, allocating the deceased an occupation on which to base the minimum wage would amount to speculation.... I am of the considered view that the award of the trial Court should be set aside. A lump sum of Kshs. 400,000/= as general damages will be sufficient in the circumstances of this case.”

26. In conclusion the court makes the following orders;

(i) The trials court judgement is hereby set aside.

(ii) General damages as hereunder;

(a) Loss of expectation of life Kshs 100,000

(b) Pain and sufferingKshs. 30,000

(c) Loss of dependencyKshs.40,000

(iii) Special damages.....Kshs.88000

(iv) Total Kshs.....Kshs 618,000

(v) GRANT TOTAL LESS 10%.....KSHS. 556,200

(vi) The above (v) sum shall attract interest at courts rates from the date of the judgement at the trials court till payment in full.

(vii) Each party shall meet their respective costs in this appeal.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 17TH DAY OF FEBRUARY 2022.

H K CHEMITEI.

JUDGE