



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.26 OF 2018

CAROLINE JEROTICH (Suing as the legal Representative of the Estate of the late

CHRISTOPHER BETT (Deceased).....APPELLANT

VERSUS

EASY COACH LIMITED.....1ST RESPONDENT

NATHAN OBWONDI.....2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Principal Magistrate Hon. B Mararo

In Nakuru Cmcc No.1001 of 2016 Delivered on 21st February 2018).

JUDGEMENT

1. The appellant's deceased husband was involved in a fatal road traffic accident on 7th December 2012 along Eldoret Nakuru road at Margaret Kenyatta area. The deceased was travelling aboard motor vehicle registration no. KBN 060Z which collided with motor vehicle reg. no. KBM 783B owned by the 1st respondent and driven by the 2nd respondent.
2. As a result of the said accident the deceased together with other occupants sustained fatal injuries. The appellant file suit seeking both general and special damages. The parties after the appellant had testified entered a consent on liability at 80:20 in favour of the appellant as well as the respondent.
3. The parties filed their written submissions on quantum and in its judgement the trial court awarded a sum of Kshs 2,155,500 and the above ratio was to be reckon.
4. The appellant was dissatisfied with the said judgement and preferred this appeal which is premised on one single issue, namely whether the award was manifestly low in the circumstances. In other words, did the trial court failed to take into consideration salient factors in calculating the said damages.?
5. The evidence before the trial court was uncontroverted. The deceased died on the spot. He left behind the appellant and some minor children aged 5 and one year's respectively. The appellant said that the deceased was a businessman as well as an aspiring politician under PNU party and that there was every indication that he was going to win the election and thus be an MP for Emgwen or Chesumei constituency but for the cruel hand of death.
6. She further testified that the deceased was earning a monthly salary of kshs. 300,000 and that they were renting a house within Elgon view estate at a monthly rent of kshs. 70,000.
7. The trial court after hearing the parties and their written submissions arrived at the above decision which the appellant is challenging. This court directed the parties to file their submissions which they have complied.
8. The appellant content that the trial court did not consider her submissions and as a matter of fact failed to carry out the analysis of the evidence as expected under Order 20 Rule 4 of the Civil Procedure Rules. She said that the trial court awarded a global sum under loss of dependency in total disregard to the claim under the Law Reform and the Fatal Accident Acts. She went on to fault the trial court for failing to consider the multiplicand, multiplier and dependency ratio despite the evidence on record.

9. She said that the deceased was a trained accountant and was working with Jomo Kenyatta Foundation as per the statements from Equity Bank Ltd. She said that based on his political ambitions the deceased would have been elected and would have earned a salary of Kshs. 800,000 as a member of parliament. She produced some gazette notice indicating the anticipated salaries of members of parliament.

10. The deceased was 35 years and full of life and was just beginning to enjoy his life with his young family. That barring all the vagaries of life the deceased would have enjoyed his life till the retirement age of 65 years. She thus adopted a multiplier of 30 years and concluded that the deceased would have earned a total of Kshs. 221,100,000 which the trial court failed to agree with her.

11. The respondent's submissions basically agreed with the trial court and reiterated what they submitted at the trial court. That the award of Kshs 2million under the heading **loss of dependency** was adequate in the circumstances as the appellant failed to prove what the deceased used to earn. They submitted that it was not enough for the appellant to state that the deceased was earning a total of Kshs. 300,000 per month without any evidence. That the production of a bank statement without any source of the deposits was not sufficient. They therefore urge the court to dismiss the appeal.

ANALYSIS AND DETERMINATION

12. As correctly captured by the parties the issue at hand herein revolves around the question of loss of dependency. The trial court as correctly put by the applicant simply plucked the figure in its brief judgement without laying much basis over the same. Be it as it may can it be said that the award was manifestly low in the circumstances?

13. The duty of this court at this juncture was well captured in the now famous case of **SELLE V. ASSOCIATED MOTOR BOAT CO. (1968) E.A. 123** where the court opined that;

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

14. It seems clear that the two approach of calculating damages under this heading is by **multiplier approach** where the facts are clear and straight forward and a **global sum approach** where mathematically it is not very possible and thus simply make an approximation depending on a case by case basis.

15. In the matter at hand it was the evidence of the appellant that the deceased used to be an accountant at Jomo Kenyatta Foundation and later was interested in running for politics under a party known as PNU. As a matter of fact, he was an Executive Director of the said PNU party and he produced evidence to that effect. She also produced clearance from the Anti-Corruption Commission as well as KRA to show that indeed he had advanced his political agenda.

16. In essence the appellant was very optimistic that her husband was going to cling the MP seat come the next general election and his salary would have shot to Kshs. 800,000 as per the gazette notice she relied on.

17. Unfortunately, and just as submitted by the respondent there was no payslips or any other evidence whether documentary or otherwise to indicate the deceased's earning either from Jomo Kenyatta Foundation or from his PNU party as its Executive Director. The correspondences from the said party simply indicates the position he was holding but nothing in terms of his remuneration or at all.

18. The bank statements from Equity Bank are simply bank statements and nothing much. The entry for instance on 1st December 2011 of Kshs 1,460,000 does not indicate the source. The same applies to the entry of Kshs. 605,000 on 5th April 2012 and thereafter other small deposits.

19. If, for instance, the deposits were from salaries or other allowances or emoluments, then nothing was easier than producing the evidence. Even if it was for businesses, then the source would have been indicated. It was not sufficient to produce clearance from KRA indicating that he was tax compliant.

20. In the absence of tangible evidence of source of income or earnings one could not therefore get a clear multiplicand applicable. There was no evidence as well that the deceased paid rent of Kshs. 70,000 per month nor any tax for that matter.

21. That left the court to apply a global sum approach which Justice Ringera (retired), as he then was, in the case of **MWANZIA VS NGALALI MUTUA VS KENYA BUS SERVICES (MSA) LTD & ANOTHER** expressed himself thus;

"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."

22. Based on the above approach, the trial court was right as there was no ascertainable income of the deceased. The deceased age was not in dispute as well as the fact that he was in his prime state. There was no evidence of ill health and the political horizon was positively beckoning. Even so, there was no guarantee that he was going to be elected a member of parliament. Politics can be a pure gamble as it is only until the electoral body gives one the certificate that indeed one can be sure. Further even if the PNU party was popular, there must have been other competitors and at any rate the electorates were the final umpires.

23. The figure of kshs.2million by the court was not low in the circumstances taking into consideration that the deceased was still young and in his prime age. The family he left behind was young and still needed his support. The appellant failed to prove the deceased earning and the trial courts award in the circumstances was reasonable.

24. **Section 107 of the Evidence Act chapter 80 Law of Kenya** demands that he who alleges must prove. It goes on to state that;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

25. There was no material placed before the trial court indicating the deceased’s earning whether monthly or otherwise and neither was his sources of income proved.

26. For the foregoing reasons, this court does not find any reason to disturb the findings by the lower court. The appeal is hereby dismissed with no orders as to costs.

Dated signed and delivered electronically at Nakuru this 25th day of February 2021.

H .K. CHEMITEI

JUDGE.