



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 29 OF 2018

(CORAM: F.M. GIKONYO J.)

(Appeal against Judgment of Hon W. Juma (C.M) delivered on 11.12.2018

in Narok CMCC No. 215 of 2016)

EVALINE CHEPKIRUI (suing as the legal representatives of the estate of the late

KIPROTICH CHERUIYOT).....APPELLANT

VERSUS

STELLA ASUGA.....1ST RESPONDENT

ERICK OMWENGA.....2ND RESPONDENT

JUDGMENT

Introduction

[1] The Appellant instituted a claim under Fatal Accident Act and Law Reform Act vide a plaint dated 2/12/2016 in which she claimed on behalf of Estate of Kiprotich Cheruiyot deceased who died in a fatal accident in a road traffic accident.

[2] The parties thereto recorded a consent on liability in the ratio 90;10 in favour of the appellant against the Respondents.

[3] Parties filed submissions on the issue of quantum and the trial court awarded the appellant as follows;

i. Loss of expectation of life- Kshs 100,000/=

ii. Pain and suffering- Kshs 10,000/=

iii. Loss of dependency – Kshs 2,720,000/=

iv. Special damages – Kshs 44,350/=

v. 90% of the sum total that is Kshs 2,874,350/= which gives a sum of Kshs 2,586,915/=

The appeal

[4] Being aggrieved by the above decision, the appellant lodged this appeal and set out the following grounds:

a. That the learned trial magistrate erred in law and in fact in awarding the Appellant general damages under loss of dependency which was too low.

b. That the learned trial magistrate applied wrong principles in determining an award payable to the Appellant under the loss of

dependency.

[5] Parties agreed to canvass the appeal via submissions which they filed and exchanged.

Appellant's Submissions

[6] According to the appellant, the death certificate and also the evidence of PW1 show that the deceased was aged 36 years. PW1 testified that the deceased worked at GASTALST company in Nairobi as a company operator where he earned a monthly income of Kshs. 25,370/=. This was proved by production of pay slip **Pexh 10**.

[7] The Appellant further submit that the trial magistrate erred in her judgment in applying the net income of Kshs. 17,000/= when assessing the loss of dependency. That the correct figure should have been the gross pay less the tax element (P.A. Y.E.). To fortify this view they have relied on the following authorities; **Charles Mageto & Another Vs Sospeter Ndungu Kamau (Suing As The Legal Representative of His Late Son Arthur Nderitu Ndung'u (Unreported), Leonard O. Ekisa & Another Vs Major K. Birgen [2005] eKLR, Roseline Ayuma Khisa & Another V West Kenya Sugar Company Limited [2019] eKLR.**

[8] The Appellant urged the court to find that if any deductions are required then the only deductions that ought to have been done was for the P.A.Y.E. which was Kshs. 3,577.60/= per month. The rest of the deductions done on the gross income were for the monies taken for the benefit of the estate and should not be deducted while assessing the multiplicand. That this court should adopt the multiplicand to be the monthly income of Kshs. 21,792.40/=-.

[9] The Respondent further submit that the multiplier of 20 years adopted by the court for a deceased aged 36 years was too low in the circumstances considering that the deceased was not a government employee hence not curtailed by retirement age. That he would have worked up to the age of 70 years. No evidence of any vicissitudes of life or other imponderables or illness which would have shortened the deceased's working life was laid forward. The appellant proposed a multiplier of 34 years. She has relied on the case of **Violet Jeptum Rahedi Vs Albert Kubai Mbogori(2013) eKLR.**

[10] The appellant urged this court to disturb the award of the trial court and relied in the case of **Tridev Construction Vs Charles Wekesa Kasembeli Civil Appel No. 121 Of 2002.** in conclusion she prayed that the appeal be allowed, the judgment on loss of dependency and damages payable to the appellant under this limb be assessed as prayed. That the appellant to be paid costs and interests of the appeal.

Respondents' Submissions

[11] The Respondents submitted that it is trite that assessment of quantum of damages in a claim for general damages is a discretionary exercise. The law has set dimensions for an exercise of discretion; must be exercised judicially, with wise circumspect and upon legal principles. They have relied on the case by the Court of Appeal in **Kanga V Manyoka [1961] EA 705,709, 713 & Lukenya Ranching And Farming Coop Society Ltd Vs Kavoloto [1979] EA** as quoted by this court in the case of **Paul Kipsang & Anor. Vs Titus Osule Osore [2013] eKLR** where the legal principles were set out.

[12] The Respondents further submit that the multiplier of 20 years adopted by the court using a multiplicand of Kshs. 17,000.00/= is not inordinately low. It is not disputed that the deceased was 36 years old at the time of death. He was married and had children. The respondents have cited the following case law which are within the range of a multiplier of 20 years to support their view; **Pleasant View School Limited V Rose Muthu Kithoi & Another [2017] eKLR, Elizabeth Chelagat Tanui 7 Another V Arthur Mwangi Kanyua [2013] eKLR, and Elite Earthmovers Ltd V Kiilu Masenge & 2 Others [2019] eKLR.** It is therefore their view that the trial magistrate correctly applied discretion and principles in using a multiplier of 20 years.

[13] The Respondents contend that the appellant availed the deceased's pay slip for March 2016 from GESTALT GILD LTD which showed the deceased's gross pay as Kshs. 25,370.00/= and net pay of Kshs. 17,004.40/=. The deductions made to the gross salary were tax (P.A.Y.E) Kshs 2,415.60 (being tax 3577.60/= less personal relief Kshs. 1,162.00) NSSF Kshs 200.00/=-, NHIF Kshs 750.00/=-, Ukulima sacco savings fund Kshs. 2,000.00/= and interim advances Kshs 3,000.00/=-. These deductions made up the net pay of Kshs. 17,004.40/=-. They therefore submit that the trial magistrate correctly upheld the principles set out in **Albert Muange Mwanthi & Another Suing as an Administrator of the Estate of Faith Ndete Muange – Deceased) V Dornic Muthama Muange & Another [2020] eKLR And Sterling Civil Engineering(U) Ltd Vs Margaret Kirumira & Others SCCA No. 2 Of 1991** in computing loss of dependency using net earnings.

[14] The Respondents submitted that the savings were for the benefit of the entire family and not the deceased alone. No addition should be made to the net earnings of Kshs. 17,004.40/=-. They have relied in the case of **Albert Muange Mwanthi Supra.**

[15] On the issue of costs, the respondents submitted that costs follow the event. They prayed for costs based on section 27(1) of the Civil Procedure Act. They urged this court to uphold the judgment of the trial court and dismiss the appeal herein.

ANALYSIS AND DETERMINATION

Duty of court

[16] The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

[17] This appeal is on quantum of damages only. I will, therefore, be guided by the test on when an appellate court would interfere with the

discretion of the trial court in assessment of damages which was adumbrated in the case of *Kemfro Africa Ltd v Lubia (supra)* as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Claim under Law Reform and Fatal Accidents Act

[18] This claim was founded on Law Reform Act and Fatal Accident Act. These law provides for awards being made for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

LOSS OF DEPENDENCY

[19] In this appeal, the only quarrel is on quantum of damages for loss of dependency under the Fatal Accidents Act. Section 4 thereof becomes relevant; it provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct.”

The concepts of multiplicand and multiplier

[20] Of the concepts of multiplicand and multiplier; meaning, scope and application in assessment of damages for loss of dependency, see the case of *Beatrice Wangui Thairu V Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 Of 1988* where Ringera J (as he then was) stated:

“The principles applicable to an assessment of damages under the Fatal Accidents Acts are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

Multiplier

[21] The trial magistrate found that the deceased was of the age of 36 years when he died. She accepted and apportioned the dependency factor going by the testimony of the claimant and documentary material admitted at the trial of the claim. The children and wife are dependants of the deceased and are entitled to be compensated for the loss arising from the premature death of the deceased caused by the negligent acts of the Respondents. Dependency was proved and has not been controverted. I so find.

[22]The bone of contention is *inter alia* on the multiplier of 20 years used by the learned trial magistrate. Also in controversy is the multiplicand used; net income of Kshs. 17,000/= per month. But, the latter will be discussed and determined later.

[23]I have considered the cases cited by both counsels as well as the principles applicable to multiplier. I draw attention to the following significant evidentiary material on record: (i) The death certificate indicates that the deceased was aged 36 years when he died; and (ii) the deceased was company operator.

[24]When only such information is available, a court cannot avoid to workout loss of dependency on assumptions. This dilemma is described by some eminent justices as... *consideration of a number of highly speculative factors*. See **Lord Diplock** in *Cookson v Knowles (1978) 2 ALL ER 604*, that:

“This kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow’s death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and dependent children?”

[25] This dilemma has not diminished. Nonetheless, is the appellant’s argument that the deceased may have worked up to the age of 70 years, appropriate hypothesis? Also, is their submission that retirement age of 60 years is only applicable to civil servants a rule of thumb? Nothing guarantees employment up to 70 years of age. Frailty of human body or ill health or other eventualities may curtail a person’s

employment. Similarly, private companies are known to retire employees at an early age or the statutory age provided for civil servants. Therefore, ascertainment of the appropriate multiplier remains at the discretion of the court. Did the trial court, therefore, commit an error in the assessment of the appropriate multiplier as to justify interference by this court?

[26] I have looked at the cases cited. Consider also the case of *Pleasant View Limited V Rose Mutheu Kithoi & Another [2017] eKLR* where the court adopted a multiplier of 20 years for a 36 years old deceased person to calculate loss of dependency.

[27] In light of vicissitudes of life, which are in the realm of unknown: Bearing in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. And make an allowance of legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature: the trial court did not err in adopting a multiplier of 20 years for the deceased who died at the age of 36 years. I reject the ground of appeal on multiplier.

Multiplicand applied

[28] The outstanding issue now is whether or not the learned trial Magistrate was wrong in her ascertainment of the applicable multiplicand in the assessment of general damages for loss of dependency. The trial court applied net pay income of Kshs. 17,000/=.

[29] The appellant has fastened a quarrel with the trial court's ascertainment of the applicable multiplicand. According to the appellant, the trial court ought to have deducted only tax element from the gross salary.

[30] I note from the record that the trial court allowed other deductions over and above the tax payable (PAYE). My understanding of this aspect of law is that, not all deductions in a pay slip are discounted in the ascertainment of the multiplicand for purposes of loss of dependency. I should think that, only the tax element is to be deducted from the gross pay. PAYE is tax payable to government. However, statutory and other deductions whose beneficial owner is the deceased and his estate, are not to be discounted when assessing dependency. There is no dearth of judicial authorities on this point; I have not any wish to multiply. Accordingly, the trial court applied the wrong principle in assessing the multiplicand applicable in loss of dependency in this case. As such, the discretion thereto is amenable to interference by this court. I set aside the multiplicand adopted by the trial court.

[31] The evidence shows that the deceased earned a gross salary of Kshs. 25,370. PAYE was Kshs. 3,577.60. The net income for our purposes is therefore Kshs. 21,792.40. In the upshot, the appropriate multiplicand is 21,792.40. Accordingly, loss of dependency is calculated thus: -

a. **Kshs. 21,792.40 x 12 x 20 x 2/3 = 3,486,784.**

[32] For the above reasons I allow this appeal partially and set aside the award for loss of dependency made by the trial court. All the other items awarded were not contested and are proper in law. I award them as shown below. I set aside the judgment of the trial court and enter judgement for the appellant and against the respondents jointly and severally in the following terms: -

a) *Loss of dependency* - **Kshs. 3,486,784/=**

b) *Pain and suffering* - **Kshs. 10,000/=**

c) *Loss of expectation of life* - **Kshs 100,000/=**

d) *Special damages* - **Kshs 44,350/=**

Total - **Kshs 3,641,134.00/=**

LESS 10% - **Kshs. 364,113.40**

Net - **Kshs 3,277,020.60/=**

[33] Each party to bear its own Costs of this appeal.

Dated, signed and delivered at Narok through Teams Application, this 27th day of April 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Makori h/b for Gekonga for the Appellant

2. Kariuki for the Respondents

3. Mr. Kasaso – Court Assistant

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F. GIKONYO

JUDGE