



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 130 & 134 OF 2019

(AS CONSOLIDATED)

CALEB RIAT ODERO and WAGNER OKINYI

(Suing as legal representatives and administrators of the estate of

GRACE ANYANGO RODI).....APPELLANTS

VERSUS

UNITED MILLERS KISUMU.....1ST RESPONDENT

DENIS KEMBOI.....2ND RESPONDENT

[An appeal from the judgment of Honourable J. Ng'ang'ar, Chief Magistrate Kisumu

dated and delivered on the 18th September 2019 in KISUMU CMCC NO. 100 OF 2018]

RULING

The appeal herein is a combination of 2 appeals. In the first instance the original Defendants lodged an appeal asserting that;

(a) the multiplier of 15, which was applied by the trial court was arbitrary. It was their contention that a multiplier of 10 was appropriate;

(b) the dependency ratio of 2/3 was not supported by evidence. The Appellants invited this court to apply a dependency ration of ½ ;

(c) the trial court failed to apportion the awards to the minors and to make appropriate orders for investment.

1. In the cross-appeal, the original Plaintiffs asserted that;

(i) The sum of Kshs 4,008,000 which was awarded in respect to Loss of Dependency was too low. They asserted that the appropriate quantum ought to be Kshs 6,681,000/=.

(ii) The trial court erred by awarding Special Damages of Kshs 75,000/=, whilst the evidence supported the award of Kshs 87,800/=.

(iii) The trial court ought to have used a multiplier of 20, instead of 15.

2. In the event, this court is now called upon to determine the following issues;

Multiplier

3. What multiplier meets the justice of this case? Should it be 10, 15, 20 or any other one?

Dependency ratio

4. Should it be 2/3 or 1/2?

5. Having determined the ratio, the court would then calculate the Loss of Dependency.

Special Damages

6. What amount was pleaded and proved by the Plaintiff; was it Kshs 75,000/= that was proved or was it Kshs 87,800/=?

Pain & Suffering

7. Should it be Shs 20,000/= as awarded by the trial court, or should it be Kshs 100,000/= as sought by the original Plaintiffs?

Loss of expectation of Life

8. The trial court awarded Kshs 150,000/=: should that be upheld?

9. Being the first appellate court I appreciate that my task in determining whether or not I would be justified to interfere with the quantum of damages awarded by the trial court is in establishing if the trial court had either taken into account an irrelevant factor or if the said court had failed to take into account any relevant factor.

10. It is well established that comparable injuries should be compensated by comparable awards.

11. I will re-evaluate the evidence tendered, and do so within the context of the pleadings. In the process of drawing my conclusions from the analysis, I will continually bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses whilst they were tendering their evidence.

12. **PW1, CALEB RIAT ODERO**, was the husband to **GRACE ANYANGO RODI**, who suffered a fatal accident in the incident which gave rise to this case.

13. He testified that the deceased was the breadwinner in their family, which has 4 children. **PW1** said that it was the deceased who paid school fees for all the children.

14. He exhibited the pay slip of his late wife, which showed that her Gross Salary was Kshs 40,599/25.

15. According to **PW1**, he worked as a Pastor, who provided voluntary service.

16. During cross-examination **PW1** said that after his wife died, he paid school fees for their children. He also paid for their upkeep.

17. He said that he relied upon Church contributions, however, he did not have specified earnings based on his duty.

18. During re-examination, **PW1** said that he had also been using his own savings as well as the savings of his late wife, to support the family. He specified that the Pension from **G4S**, and the money from the **SACCO** had helped him.

19. The Plaintiff said that his wife died on the spot.

20. At the time of her death, the lady was 40 years old.

21. The Plaintiff was 42 years old, whilst the 4 children were 15, 12, 9 and 6 years old, respectively.

Determination

(a) Pain & Suffering

22. As the parties have noted, and in line with the case of **SUKARI INDUSTRIES LIMITED Vs CLYDF MACHIMBO JUMA, HCCA NO. 68 OF 2015**;

“..... I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for the death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.”

23. That principle, as annunciated by the Court of Appeal, is binding upon this Court: and it is noteworthy that it is the original Plaintiffs who cited the authority.

24. Considering that the deceased died on the spot, and because there was no evidence to prove any prolonged suffering, I hold the considered view that the Plaintiff was entitled to no more than nominal damages in respect to pain and suffering.

25. Accordingly, the award of Kshs 20,000/= by the trial court was reasonable. I find no reason to warrant any interference with it.

(b) Special Damages

26. The trial court awarded Special Damages amounting to Kshs 75,000/=. The court did so on the strength of

“the total of the receipts to support the claim.”

27. I have looked at the receipts.

28. The only receipt disputed by the original Defendants is in respect of the coffin. They say that the receipt was for Kshs 10,000/=.

29. The receipt issued by **OFUNYU JERUSALEM (KOLWA) FURNITURE**, in respect of the coffin was for the sum of Kshs 20,000/=.

30. As the original Defendants indicated that the Special Damages should be discounted by Kshs 10,000/=, to give a total of Kshs 77,800/=, I find that the correct total is Kshs 87,800/=, because there is absolutely no justification for discounting the sum of Kshs 10,000/=.

(c) Dependency Ratio

31. The deceased was 40 years old at the time she met her death.

32. Her husband said that she was the breadwinner, as she paid the rents and also the school fees for all their 4 children.

33. The trial court adopted a dependency ratio of 2/3.

34. But the original Defendants submit that the appropriate dependency ratio should be ½.

35. In the case of **BEATRICE WANGUI THAIRU Vs. HON. EZEKIEL BARNGETUNY & ANOTHER HCCC NO. 1638 OF 1988**, Ringera J. held as follows;

“I am constrained to observe that there is no rule of law that two-thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to be the value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not.”

36. Therefore, the dependency ratio is not just a conventional sum, but it is a realistic assessment based on factual evidence.

37. The loss to be compensated is for the loss suffered by the dependants, who were hitherto being supported by the deceased.

38. In this case the deceased was said to have been paying rent and school fees. Therefore, her husband described her as the breadwinner.

39. The Plaintiffs submitted that the family was wholly reliant upon the deceased, as the husband had no regular income in his job as a volunteer pastor.

40. But the pastor also confirmed that after the death of his wife, he has been able to continue paying school fees for all the 4 children.

41. He does so with funds from well wishers and tithes from the church. But as is very clearly stated in his letter of appointment, the Plaintiff did not have a salary. He would only be paid an

“allowance as they will afford.”

42. Although the allowance may not be a specified amount every month, it appears that it has been sufficient to sustain the Plaintiff and the children.

43. There was no evidence that the allowance increased after the Plaintiff's wife died.

44. And the Plaintiff testified that he used to share responsibilities with his wife.

45. There is no indication that the responsibilities they shared were necessarily of a monetary nature.
46. Having given due consideration to all the evidence, I find that the deceased used to spend 2/3 of her income on the family.
47. The husband has been able to continue meeting the rental payments, fees and upkeep; but it is notable that he has partly done so using the Pension of the deceased, and money from the SACCO.

(d) Multiplier

48. The deceased was 40, at the time of her death. The court held that she would have worked until she was 60 years old. However, the court also took into account the vurgaries of nature, and pegged the multiplier at 15 years.
49. In the case of **NEHEMIAH KIBET BUNEI & ANOTHER Vs PAUL KANGOGO TUITOEK, HCCC NO. 326 OF 2001** (Nakuru), the Court held as follows;

“The fact that salaried Kenyans are the ones who are most likely to die on road accidents due to their ability to afford to travel from one urban center to another, means that this court would be naïve if it assumed that the deceased could have lived to a ripe old age. In the particular facts of this case, I will adopt a multiplier of ten years.”

50. In that case, the deceased was 42 years old.
51. In the case of **GEORGE MOGA Vs NAIROBI WOMEN’S HOSPITAL & 3 OTHERS, HCCC NO. 477 OF 2009**, the deceased was 40 years old. The learned trial Judge adopted a multiplier of 25, after she had taken into account the vicissitudes of life.
52. I note that in that case the deceased was self-employed, and the court seems to have been persuaded that the deceased could possibly have worked until the age of 70. In other words, because the deceased was not limited by some set retirement age, she could have worked to the ripe old age of 70.
53. Whilst it is possible for people to work until the age of 70 or beyond, the court must also remain alive to the uncertainties of life. Some people die at much younger ages, whilst others live and work until they were much older.
54. The determination of an appropriate multiplier cannot therefore be based on some mathematical or scientific formula.
55. In my considered opinion, based upon an analysis of the many authorities made available by the parties herein, a realistic age that the deceased would have continued working, (all things being constant), would be 60.
56. Having reached that conclusion, I find that the learned trial magistrate was right to have discounted the number of years by 5, in order to take into account the vicissitudes of life.
57. Accordingly, I uphold the award of Kshs 4,008,000/= for Loss of Dependency.

Division of the sums awarded

58. Pursuant to the provisions of **Section 4 (1)** of the **Fatal Accident’s Act**, the compensation awarded, should be divided amongst the beneficiaries, on whose behalf the suit had been instituted. The court is charged with the responsibility of apportioning the said award.
59. The evidence shows that the deceased was survived by the following dependants;

- (a) Caleb Riat Odera – Husband – Adult**
- (b) SM - Daughter – 15 Years**
- (c) SO – Son - 12 Years**
- (d) HER – Daughter - 9 Years**
- (e) TIC – Son - 6 Years**

60. The compensation awarded is made up as follows;

- (i) Pain and Suffering.....Kshs 20,000**
- (ii) Loss of Expectation of Life.....Kshs 150,000**
- (iii) Loss of Dependency.....Kshs 4,008,000**

(iv) *Special Damages*..... *Kshs 87,800*

Sub-total.....*Kshs 4,265,800*

LESS 10% *426,580*

TOTAL *Kshs 3,869,220*

61. I take into account the fact that the children require the support and guidance of their father. It is he who is to provide shelter, fees and their upkeep. Therefore, he is awarded the single largest proportion of the damages, so as to enable him provide for the children.

62. Having apportioned to the father the portion which will enable him take care of the children appropriately, I find that each of the children should be accorded equal treatment.

63. I appreciate that the younger children may require more overall, as the period during which they would require their father's support was longer, before the children can stand on their own feet. However, I find that the required support would be best provided by the father, who would be expected to use his sense of good judgment to provide for the appropriate needs of each child. It was for that reason that the father was given the lion's share.

64. Accordingly, the father shall get 60% of the award, whilst each of the children will get 10%.

65. The shares of the children shall be invested in an interest-earning Bank Account, and shall only be accessed for their respective benefits, upon each of them attaining the age of 21.

66. However, there shall be liberty to apply, in respect of each of the children, should it transpire that the father is otherwise unable to meet a specific need for any such child, upon the child attaining the age of 18.

67. Such application, if any, shall be made by the father, if necessary.

68. Finally, I order that each of the parties will meet their respective costs of the appeal. I so order because the parties have all assisted the court in reaching a just determination of the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE