



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 55 OF 2020

MOSES MUTHURI.....APPELLANT

VERSUS

MERCY NKIROTE

(Suing as the legal representative of the estate of Luka Kirimi (deceased).....RESPONDENT

(An appeal from the Judgment and Decree of Hon. C.K Obara (P.M)

in Maua CMCC No. 146 of 2017) delivered on 29/06/2020)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 14/08/2017 in which the respondent sued the appellant seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Kshs 43,500/= and costs of the suit. The gist of the claim was that on or about 15/01/2017 at about 11:00 p.m. The deceased was a lawful passenger in Motor Vehicle Registration No. KBW 274 E, Toyota Probox, when at Kaithe area, along Maua-Kiengu Road, the appellant and or/his appointed driver/employee so negligently drove the said motor vehicle that it lost control, veered off the road causing the said accident thereby occasioning fatal injuries to the deceased leading to his demise. It was pleaded that the deceased was at the date of the accident aged 38 years, was in good health with a bright future ahead, he was the bread winner of his family but his life was cut short due to the said accident with the consequence that his dependants and estate suffered loss and damage and claim damages.

2. The appellant strenuously denied the claim by his statement of defence dated on 09/02/2018 in which all the allegations in the plaint including the standing of the respondent, the appellant's association with the motor vehicle, the occurrence of the accident and the manner thereof, the alleged injury as well as damage with alternative plea that the accident was otherwise inevitable, that the respondent lacked standing and then prayed for the respondent's suit to be dismissed.

3. After conclusion of the trial, the trial court found that the respondent had proved her case on a balance of probability apportioned liability at 90:10 in favour of the respondent and entered judgement for damages in her favour against the appellant for loss of dependency Kshs 1,300,000, special damages Kshs 40,000 plus costs and interests.

4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 29/07/2020 setting out two (2) grounds of appeal. A proper reading of the two ground however reveal that the appeal is on one ground that the award of loss of dependency was erroneous on the basis that no dependency was proved by the respondent.

5. This being a first appeal, this court is enjoined to revisit the evidence led before the trial court in whole and afresh, analyze and evaluate it with a view to arriving at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and give allowance for that. See *Selle v Associated Motor Boat Co. & others [1968] E.A. 123*.

6. At the trial, only **PW1, Mercy Nkirote**, the plaintiff and widow to the deceased and the respondent herein testified and told the court that the accident occurred on 15/01/2017 at about 11.00 p.m along Maua-Kiengu Road at Kaithe area involving a Toyota Probox No. KBW 274 E driven by the appellant. That the deceased was a lawfully travelling passenger in the said motor vehicle when the appellant so carelessly drove the said motor vehicle that it veered off the road causing the accident which led to the death of the deceased. She added that the deceased was a miraa businessman earning approximately Ksh.1,000 per day, that he left behind 4 children and was the family bread

winner. She produced Limited grant and the receipt thereto (PEXh 1 and 2) respectively, demand notice together with its receipt (PEXh 3 and 4) respectively, copy of death certificate (PEXh 5), police abstract (PEXh 6) and copy of chief's letter (PEXh 7) in support of her case. She told the court that the deceased was at the time of his demise aged 38 years and in good health. That evidence was given in the absence of the appellant after the court was satisfied as to service and the appellant did not testify to controvert the testimony of the respondent, PW1.

7. In this appeal, parties filed their respective submissions on 28/09/2020 and 23/10/2020 and I have had the benefit of reading both.

8. The appellant firm position is that the respondent failed to establish by way of evidence that she was the wife of the deceased and that they had 4 children. It was further submitted that the trial court erred in awarding Kshs 1,300,000 for loss of dependency yet the same had not been proved with a conclusion that the mere mention of a person to be a wife or that the deceased had 4 children is in itself insufficient to prove dependency. Counsel then cited to court the decision in *Tom Oluoch Oloo(Suing as the legal representative of the estate of George Ochieng Ngoche (deceased) v African Safari Club (2019) eKLR* for the proposition that parties are bound by own pleading and that damages could have only ensued under the Fatal Accidents act as pleaded and that dependency is a matter of facts to be proved by evidence

9. On her part, the respondent submitted that she had proved the deceased was her husband and that they had 4 children. She cited to court several decisions including *Jacob Ayiga Maruja vs obayo (2005) eKLR*, for the proposition that proof must not be by documents only, *Peter Chege vs Joyce Litha Kitonyi (2016) eKLR*, and *Sirayam Enterprises vs Samuel Nyachani (2015)* on what amount to proof of dependency and income. The decisions in *kemfro Africa ltd vs Lubia (1987) klr 27* and *Butt vs Khan (1977)kar 1* were cited on when an appellate court would interfere with assessment of damages by the trial court .

10. Being an appeal on the sole question of propriety of the award of damages owing to an alleged paucity of evidence, the only issue for determination is whether the award of Kshs 1,300,000/- for loss of dependency was justifiable.

11. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now settled and trite and only needs to cite Bashir *Ahmed Butt v. Uwais Ahmed Khan [1982-88] KAR 5*, where the court of appeal reiterated the position of the law thus: -

“an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. That it must be shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material respect and thereby arrived at a figure which was either inordinately high or low.”

12. In this appeal, the appellant contention is not that the award is too high but rather that there was never proof of dependency by the respondent upon the deceased. The determination of this appeal calls for interrogation if the respondent discharges her burden before the trial court. That must entail review and re-evaluation of the evidence led. In that very brief evidence tendered, the respondent said: -

“my husband was a mirraa businessman. He would make a profit of about 1,000 per day. We have 4 children. He used to provide for us.”

13. And upon cross examination she added:-

“My husband used to earn 1,00 per day. In a month he could get 30,000...That is the money we used to spend”

14. That evidence fell for evaluation by the trial court at page 56 of the record of appeal, and the trial court in its judgement observed: -

“the plaintiff testified that her husband was a miraa businessman. Even though no evidence was availed to confirm that position, I have no reason to doubt that he engaged in a meaningful income generating activity. I am aware that most people within this jurisdiction engage themselves in miraa farming/business activities. The deceased was aged 38 years at the time of his demise. No evidence was adduced to show that he suffered any ill health. He would have worked till his age or health fails him unlike civil servants who mostly retire at the age of 60 years. In view of the fact that there was no proof of earnings and dependency, I am inclined to abandon the multiplier approach. Considering inflationary trends and the principles to be taken into account in the assessment of general damages, I award a global sum of Ksh. 1,300,000.”

15. The burden upon the respondent was at all times within a balance of probabilities and no higher. The record reveals that the evidence by the respondent including that the deceased would provide for her and the children was never meaningfully challenged even by way of cross examination. While I am aware that ex-parte proceedings never lessen the burden, in this matter however, the taken ex-parte was reinforced by the subsequent cross examination and became sufficient to prove that the respondent was married to the deceased and they had four children. In the submissions filed, the appellant does not come out clear what would amount to proof of marriage and dependency. I do not understand the appellant to say the deceased was a lay about with no source of income. That no evidence of income is not led or proved by documents cannot be the only reason to decline awarding damages where loss and support from the deceased is proved. In such scenario, court would apply the minimum wage and be guided by the decision in *Jacob Ayiga Maruja & anor v Simeon Obayo (supra)* that the absence of proof of the deceased earnings in form of receipts cannot be construed to mean he was not working for gain. That position has remained the law and I may only repeat what *Gikonyo j*, said in *Dr. John Gachanja Mundia v Francis Muriira Alias Francis Muthika & anor (2017)eklr:-*

“She also had some cows. She was also looking after her family which was lost upon her demise. Surely, she was of help to her family. In our own Kenyan rural set up, to expect that our rural folk will meticulously keep records of their income will be unrealistic.

... The law must be applied with socio-political and economic context within which those it affects operate in mind. One cannot be said to have contributed absolutely nothing yet she has a family to take care of, just because there is no documentary proof of her income.

16. Even if the deceased herein did not have children, if I were to ignore the evidence, a wife is the first in the list of family members an action under section 4 of the Fatal Accidents Act is brought. That provision grants to the court very wide discretion to measure the damages it thinks commensurate to the injury suffered.

17. I have not seen any misapprehension of the evidence by the trial court to invite my intervention in disturbing the award made. I find no merit in the appeal which I now order dismissed with costs to the respondent.

Dated, signed and delivered online by Microsoft teams, this 19th day of April, 2021

Patrick J O Otieno

Judge