



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 02 OF 2019

ANNA WANZA.....1ST APPELLANT

PETRONILLA MWIKALI (Suing as representatives of Estate of

FRANCIS SILA WAMBUA (Deceased)2ND APPELLANT

VERSUS

LUCY WAMBUI KIARIE.....RESPONDENT

(Being an Appeal from the judgement of the Honourable Senior Resident Magistrate E. W Wambugu (SRM) given on 13th December, 2018 in Kithimani PMCC No. 35 of 2017).

BETWEEN

ANN WANZA.....1ST PLAINTIFF

PETRONILLA MWIKALI (Suing as representatives of Estate of

FRANCIS SILA WAMBUA (Deceased)2ND PLAINTIFF

VERSUS

LUCY WAMBUI KIARIE.....DEFENDANT

JUDGEMENT

1. The Appellants herein, in their capacity as personal representatives of the Estate of Francis Sila Wambua (hereinafter referred to as “the deceased”), filed a suit against the Respondent in **Kithimani Senior Resident Magistrate’s Court in Civil Suit No. 35 of 2017** in which they sought General Damages under the Fatal Accidents Act and the Law Reform Act, Special Damages, Costs and Interests at Court fees.
2. According to the Complaint dated 20/1/2017, the deceased was on 29/4/2016 lawfully standing off Mwala-Matuu road when the Respondent or her duly authorized driver so negligently drove motor vehicle registration number **KBY 842J** along the said road that it veered off the road and collided into the deceased and as a result thereof the deceased sustained fatal injuries. The particulars of negligence were pleaded vide paragraph 3 thereof.
3. It was pleaded that the action had been brought on behalf of the family of the deceased. According to the Appellants, at the time of his death, the deceased was aged 87 years, married with a daughter and was earning Kshs. 20,000/= per month from his farming business. It was pleaded that as a result of the deceased’s death, his estate suffered loss and damage.
4. The Appellants filed witness statements. **PW1**, Anna Wanza claimed that she was the wife to the deceased and that the deceased had been the sole provider of the family. **PW2**, Catherine Ngii Musyoki, stated that she was at the scene of the accident and witnessed the deceased being crushed by the front rear wheels of the motor vehicle.

5. Both parties entered into a consent apportioning liability in the ratio of 70:30 in favour of the Appellants against the Respondent with special damages being agreed at **Kshs.70,290/=**. The parties were to thereafter file and exchange written submissions on the remaining issue of quantum of damages.

6. The trial court proceeded to award the Appellants **Kshs. 80,000/=** for pain and suffering, **Kshs.100,000/=** for loss of expectation of life and special damages in the sum of **Kshs. 70,290/=**. The court declined to make any awards on the loss of dependency due to absence of evidence on the extent of dependency by the deceased's estate.

7. Aggrieved by the said judgement the Appellants filed their Memorandum of Appeal dated 9/1/2019 in which they raised the following grounds:

i. THAT the learned trial magistrate erred in law and fact in failing to award damages under the Fatal Accidents Act.

ii. THAT the learned trial magistrate erred in law and fact in finding that the Appellants had not proved their case to the required standards under the Fatal Accidents Act.

iii. THAT the learned trial magistrate erred in law and fact in coming to the conclusion that she did without any good or sufficient cause and/or reasons.

iv. THAT the learned trial magistrate erred in law and fact in considering extraneous matters while making her decision which were based on speculation and not supported by evidence on record.

v. THAT the learned trial magistrate erred in law and fact in awarding inadequate damages under the Law Reform Act.

8. The Appeal was canvassed by way of written submissions. Both learned counsels for the parties filed and exchanged submissions.

9. It was submitted on behalf of the Appellants that the learned trial magistrate ought to have taken into consideration the 1st Appellant's witness statement while awarding damages under Loss of Dependency. The Appellants submitted that the 1st Appellant did provide evidence through her witness statement as to how much the dependents received as support from the deceased. The Appellants relied on the case of **Beatrice M. Murunge vs. Transport Consumer Ltd & Another (2014) eKLR** where Justice Wendo noted that "*if one does not prove what the deceased earned, ordinarily the court would base the earnings on the minimum wage.*" Further, the Appellants relied on **Section 4(1) of the Fatal Accidents Act Cap 32** that stipulates that "*every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.....*"

10. The Appellants submitted that, it was not mandatory for them to adduce evidence to show how much each dependent was receiving from the deceased since the provisions of section 4(1) of the Fatal Accidents Act is clear that all that is required is to show on a balance of probability that they were dependents of the deceased. The Appellants further relied on the case of **Leonard O. Ekisa & Another vs Major K. Birgen (2005) eKLR** where the court held that "*dependency is a matter of fact and need not to be proved by documentary evidence.....*"

11. On the aspect of absence of any documentary evidence on the deceased's income, the Appellants submitted that it is practice of the court to apply minimum wage guidelines depending on the skills of the deceased. This position was adopted in the case of **Leonard O. Ekisa & Another vs Major K. Birgen (2005) eKLR**.

The Appellant based on the Legal Notice No. 116 of the Regulations of Wages (Agricultural Industry Amendment Order) 2015 which took effect in 1st May, 2015 and proposed that since the minimum wage for a general worker was **Kshs.10,954.00/=** and the deceased was aged **87** years and in good health, a multiplier of 10 years against the income of **Kshs. 10, 954.00/=** and a dependency of ratio of 1/3 which translates to **Kshs. 10,954.00×10×12×1/3=Kshs. 876,320.00** less the **30** contribution leaving a balance of **Kshs. 613, 424.00**.

12. The Appellants submitted that the award on damages by the trial court was inadequate. They relied on the case of **Caroline Leah Awino Vs Stephen Miheso Ashikoyo CA 92 of 2012 eKLR** where the court awarded Kshs. 150,000.00/= for loss of expectation of life wherein the deceased was aged 75 years old and that the judgement was delivered on 29th May, 2014. The Appellants further submitted that the trial court ought to have considered inflation and devaluation facing the Kenyan currency.

13. The Appellants finally submitted that this court do award **Kshs. 200,000.00/=** for pain and suffering before death and **Kshs. 300,000.00** for loss of expectation of life.

14. The Respondent in her submissions supported the trial court's award of **Kshs. 80,000.00/=** in respect of pain and suffering. On the award of special damages, it was submitted that the award of special damages of **Kshs 70,290.00/=** was not contested as a consent thereon had been entered. It was submitted that the failure to award damages under loss of dependency by the trial court was merited as the Appellants failed to prove the same since dependency is deduced from the available evidence on how much the deceased earned and how much he spent on his family.

15. I have considered the issues raised in this appeal. This being a first appellate court, it must re-evaluate the evidence and subject it to a fresh examination so as to arrive at an independent conclusion as to whether to uphold the judgement of the trial court. This was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

16. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of **Bashir Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** 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. 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."

17. In this appeal, it is clear that the determination of this appeal revolves around the question regarding quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

18. With respect to loss of dependency, it was submitted that no proof in form of statement of accounts were produced to prove the amount that the deceased was earning. However, in **Jacob Ayiga Maruja & Another vs. Simeon Obayo (2005) eKLR** the court held:-

".....we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways...we reject any contention that only documentary evidence can prove these things."

*A different view was held by the Court of Appeal in **Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995** when it held that the issue of dependency is always a question of fact to be proved by he who asserts. The appellants did not present any evidence that the deceased used to earn Kshs 20,000/ per month as no receipts or records of income were produced. Again, the appellants failed to prove that they depended upon the deceased for their livelihood. It transpired that the deceased was aged 87 years old which implied that he was too old to act as a breadwinner for appellants who were adults in their own right. If anything, the deceased appeared to have been the one being taken care of by the appellants. I am persuaded to agree with the finding of the learned trial magistrate in rejecting to award damages under that head.*

19. As regards the award on pain and suffering, it is noted that the trial court gave an awarded the sum of Kshs 80,000/. It transpired that the deceased died on the spot and so he did not experience so much pain before breathing his last. The conventional sums awarded by the courts range between Kshs 20,000/ to Kshs 100,000/. Learned counsel for the Respondent did not have a problem with the sum of Kshs 80,000/ awarded by the trial court being upheld. I find the said sum was reasonable and fair in the circumstances of the case.

20. As regards the award on loss of expectation of life, the trial court awarded a sum of Kshs 100,000/. I note that the deceased died at the age of 87 years old and hence his productivity had already begun to wane and was probably being taken care of by the appellants. I have no reason to disturb the award under that head as it was not inordinately low as to represent an erroneous estimate of the damages.

21. In the result, it is my finding that the appellants; appeal is devoid of merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this 31st day of **May, 2021**.

D. K Kemei,

Judge