



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO. 8 OF 2019

JOHN ORIEDO ZAKAYO.....1ST APPELLANT

REUBEN ZAKAYO.....2ND APPELLANT

(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE

OF THE LATE IBRAHIM KHAMADI ORIEDO)

VERSUS

CROWN BUS SERVICE LTD.....RESPONDENT

(Being appeal from the judgement and decree of Hon. J. N. Nthuku, SRM, delivered on 26/03/2019 in the Senior Principal Magistrate's Court at Eldama Ravine in SPMCC NO 83 OF 2017, John Oriedo Zakayo & Another v Crown Bus Service Ltd & 2 Others)

JUDGMENT

1. The appellants have appealed against quantum of damages following the entry of judgement in favour of the estate of the deceased. The respondents were severally and jointly found 100% liable in negligence. This suit was brought as a test case since there is pending in the lower court a number of civil suits namely CC NO. 82, 83, 84, 98, 100 all of 2017 and CC NO. 25 of 2018.

2. The plaintiff/appellant being dissatisfied with the judgement have appealed to this court on the following grounds.

1. That the learned trial magistrate erred and misdirected herself in law and in fact in disregarding the evidence tendered by the appellants on the limb of loss of dependency and the deceased's earnings.

2. That the learned trial magistrate erred and misdirected herself in law and in fact in adopting a salary of Kshs 11,000/- and ignoring the appellants' testimony and their witnesses in court and evidence of payslips that proved earnings.

3. That the learned trial magistrate erred and misdirected herself in law and in fact in disregarding the appellants submissions on record on the limb of loss of dependency.

3. Counsel for the appellants submitted on all the grounds together and in particular mainly submitted on the issue of the earnings of the deceased.

4. I will consider all the grounds of the appeal together in which the appellants have faulted the trial court for disregarding the evidence of the appellants that was tendered in respect of the loss of dependency and the earnings of the deceased. In this regard the evidence of the 1st appellant (Pw 1) was that the deceased was his son and was aged 27 years at the time of his death. Pw 1 further testified that the deceased worked as a contractor and he earned shs 65,000/- per month. He further testified that the deceased was employed by Tsimbavasi Construction Ltd; a matter in respect of which he produced a letter from his employer as exhibit PMFI 5.

5. Pw 1 further testified he was a widower and that the deceased used to support him and his three siblings aged 18, 24 and 26 years old. He further testified that the deceased was not married but had one child.

6. Furthermore, the appellants called David Okano Oriedo, the Human Resources Manager (Pw 2), of the employer of the deceased. Pw 2 testified that the deceased was a skilled labourer and one of the directors and was earning shs 65,000/- per month. Pw 2 then produced the letter of employment of the deceased as exhibit 5. He further testified that the deceased had been working for the company since 2012.

7. Pw 2 then produced payslips for July 2017; which showed different amounts. Pw 2 disowned the payslips; which he testified were not reliable. He also relied on the letter from the employer, which he testified that it did not have statutory deductions in respect of the salary of the deceased.

8. The respondents did not call any evidence in support of their case. In Pius Kipkarere K. Mitei v Leonard Kissongochi & Another [2008] e-KLR, the court observed that where a party does not call evidence in rebuttal the court is entitled to act and find that the uncontroverted evidence is credible.

9. Based on the evidence of the appellants' two witnesses and in the absence of any evidence from the respondents, the trial court assessed damages as follows.

Damages under the Law Reform Act [Cap. 26] Laws of Kenya

10. The trial court awarded shs 20,000/- for pain and suffering, since the deceased died immediately after the accident.

Damages for loss of expectation of life

11. The trial court awarded shs 100,000/-; since the deceased was aged 27 years and was of good health.

Damages under the Fatal Accidents Act [Cap. 32] Laws of Kenya

12. The trial court found on the evidence of Pw 2, that the deceased had two payslips for the same month each showing different figures as salary. That court further found the payslips had no statutory deductions namely pay as you earn (abbreviated as PAYE). It further found that there was no explanation for the absence of the PAYE. That court then concluded that both the letter of employment and the payslips were authored for the purposes of the claim. It therefore rejected them as unreliable.

13. As a result, the trial court used the minimum wages of a machine operator for the year 2017, which was shs 11,000/- per month and proceeded to adopt it as his monthly salary.

14. The court then proceeded to compute damages payable under loss of dependency as follows.

Shs 11,000- per month x 12 months x 1/3 x 33 years (60 years retirement age subtract 27 years) = shs 1, 452, 000/- The court then made an award of shs 1, 452, 000/- as general damages.

15. I have re-assessed as a first appeal court, the damages awarded under this head and I find that the trial court erred in law in applying the dependency rule of one third (1/3), since the deceased had one child and was supporting his father (Pw 1) and three of his siblings. The trial court should have used a dependency rule of 2/3; for the one third dependency rule is used for deceased persons who have no dependents.

16. I must point out that under African customary law children, are expected to provide for their parents when they are in a position to do so. In this regard, I am guided by the decision of the Court of Appeal in *Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 others (1986)* eKLR in which the court held that children are expected to provide for their parents when in a position to do so. This is what has happened in this case. In this regard, the lead judgment of Nyarangi JA is instructive. In part he stated that: *"in general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian Communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the customs is supported by the Hindu religion whose influence on the life of the Hindu community is well nigh total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act, Cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The customs is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is 'outrageous and pernicious' is not well founded and must be rejected. I would say a judge should be very slow to criticize any particular custom, of people. There always is a purpose for the practice of a custom."*

17. Furthermore, I find as a first appeal court after re-evaluating the evidence produced in the trial court that the court properly rejected the evidence of Pw 2 that the deceased was earning shs 65,000/ per month. I have found the evidence of Pw 2 to be incredible and was rightly rejected; since the payslips produced did not reflect the statutory deductions. Furthermore, Pw 2 disowned them in court.

18. In the premises, the trial court was entitled to use the minimum wage as a basis for assessing the damages awardable to the appellants; since it did not have any evidence on the earnings of the deceased.

19. Applying the dependency rule of two thirds (2/3) to the instant case, damages under this head should have been as follows.

Shs 11,000/- per month x 12 months in a year x 33 years (60 years minus 27 years) x 2/3 (being the dependency rule) = shs 2,904,000/-. The court should have awarded shs 2,904,000/- as general damages under the head of loss of dependency.

The final award is now as follows.

1. *Special damages shs 108,120/-*

2. *Damages for pain and suffering shs 20,000/- under the Law Reform Act*

3. *Damages for loss of expectation of life shs 100,000/-*

4. *Damages for loss of dependency under the Fatal Accidents Act shs 2,904,000/-*

5. *Total award shs shs 108,120/- add shs 20,000/- add shs 100,000/- add shs 2,904,000/- = shs 3, 132, 120/=*

20. In the premises, the appellants appeal succeeds and it is hereby allowed with the result that the judgement and decree of the lower court is hereby set aside. The appellants will have the costs of this appeal and those of the lower court.

21. I therefore enter judgement for the appellants in the sum of shs 3, 132, 120/= together with costs and interest at court rates.

Judgment dated, signed and delivered in open court at Kabarnet this 28th day of May 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Sitienei, Court Assistant.

Ms Kiberenge for the appellant.

Mr. Kariuki for the respondent.