



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 265 OF 2019

1. GEDION MAITHA SIRYA

2. KENYA PORTS AUTHORITY.....APPELLANTS

VERSUS

MWANAMISI ALI (*Suing in her own capacity and as the administratrix of the estate of the late*)

SAMUEL NGEKI NJIHIA.....RESPONDENT

(Being an Appeal against the Judgment dated 27th November, 2019 delivered by the Hon. Evans Makori, Chief Magistrate in Mombasa CMCC No.1439 of 2017)

J U D G M E N T

1. The Respondents herein who were the Plaintiffs in this case had filed a case being **Mombasa C.M.C.C No.1439 of 2017** as a legal representative of the estate of **Samuel Ngegi Njihia (Deceased)** against the Appellant seeking damages for fatal injuries sustained on **26th September, 2016** while engaged as an employee of **Radiotech Solution Ltd** at the 2nd Defendant's premises.

2. In the **Plaint** dated **30th August, 2017**, it was pleaded that the deceased was working as a radiation technician going about his duty aboard **MV Crystal Ace, Motor Vehicle Chasis Number FH 227C-510280, Mitsubishi Unit** which was being driven by the 1st Respondent.

3. It was averred that the 1st Respondent carelessly managed that Motor Vehicle that it rammed into another stationary motor vehicle, **Chasis Number KDY 2318004749 Toyota Dyna Unit** causing both motor vehicles to run over the Deceased and he consequently passed.

4. However, trial the court by consent of the parties apportioned liability at 20:80% in favour of the Respondent and the hearing proceeded on the issue of quantum and parties led evidence on that. After considering the evidence presented before it, the trial court awarded the Respondent damages as follows;

a) On loss of dependency

The trial Magistrate held that the deceased was aged 25 years old at the time of demise and was a student pursuing **Computer Science** at the **Technical University of Mombasa**. That owing, the learned Magistrate was of the view that a Computer Science graduate would earn Kshs.70,000/= as starting salary and subjected the same to $\frac{1}{3}$ statutory taxation leaving a balance of Kshs.47,000/= as the applicable wage. He then used a multiplier of 25 years and a ratio of $\frac{1}{3}$ and the calculation was as follows; $Kshs.47,000 \times 12 \times 25 \times \frac{1}{3} = Kshs.4,700,000/=$.

a) Pain and suffering, the court awarded Kshs.20,000/= since the Deceased died instantly.

b) Loss of expectation for life ... Kshs.100,000/=

c) Special Damages ... Kshs.210,528/=

The total came to Kshs.5,030,528/= and was subject to 20% contribution reducing the same to Kshs.4,024,422/=.

5. The Appellant was dissatisfied with the award of general damages, and proceeded to file this Appeal raising three grounds of appeal

namely;

- a) *That the Honourable Magistrate erred in law and in fact in awarding the sum of Kshs.4,700,000.00 for loss of dependency to the Respondents which amount is too high.*
- b) *That the Honourable Magistrate erred in law and in fact in otherwise calculating the future income of the deceased.*
- c) *That the Honourable Magistrate erred in law and in fact in otherwise failing to put into consideration.*

6. The Appellants have thus urged that the Appeal be allowed, the trial court's Judgment be set aside and this Court do make a finding that the award on loss of Dependency for Kshs.4,700,000.00 was inordinately high and the same be substituted with a figure which this Honourable Court will find appropriate. The Appellants have also sought to be awarded the costs of the Appeal.

7. When this Appeal came up for directions on **2nd November, 2020**, the court directed that the same be canvassed by way of written submission which were dutifully filed by the Counsels on record for the parties. The Appellants submissions were filed on **30th November, 2020** while those for the Respondent were filed on **1st February, 2021**. Those submissions were later highlighted on **10th March, 2021** with the learned Counsel **M/s Juna** appearing for the Appellants whilst **Mr. Kibara** appeared for the Respondent.

APPELLANTS SUBMISSIONS

8. The Appellants submitted that the Respondent had failed to prove the amount the deceased was earning as an employee of **Radiotech Solutions Ltd** or in any other manner support the allegation that the deceased was also an employee of **Aga Khan University** as the contract which he had with the said facility was for two (2) years and had expired by the time of his demise. However, according to the Appellants, the trial Magistrate went against all odds and based his finding on assumption that Kshs.47,000/= would have been the deceased's net salary after graduation.

9. The Appellants fault the same alleging that, as a going concern and evidently with the high rate of unemployment, there is possibility that the deceased would not even have found any form of employment even after graduation. The Appellant further submitted that there is possibility that the deceased would have continued working as a radiation technician even long after his graduation and as such his averment was speculative.

10. The Appellants also submitted that it was upon the dependants to the deceased to prove his monthly income so as to guide the court in arriving at the multiplicand. But be that as it may, the court was invited to consider the case of **Siyaram Enterprises & Another –vs- Samuel Nyachani Nyachani [2015] eKLR**, where the Court held a monthly salary of Kshs.9,000/= as the minimum government wage in a case where the deceased's evidence of earnings was not adduced.

11. Other authorities from which the Appellant's borrowed in support of their submissions are the cases of **Ishmael Nyasimi & Another –vs- David Onchangu Orioki (Suing as personal representatives of Antony Nyabando Onchango (Deceased) [2018]eKLR**, **Charles Ouma & Another –vs- Bernard Odhiambo Ogeche [2014]eKLR**, and **Easy Coach Bus Services & Another –vs- Henry Charles Tsuma & Another (Suing as the administrators and personal representatives of the estate of Josphine Weyanga Tsuma-Deceased) [2019]eKLR**, as well as the case of **Selle –vs- Associated Motor Boat Company 1968 EA 123** to remind the court of its duty as the first appellate court, so as to re-evaluate and re-analyse the evidence produced before the trial court and draw an independent conclusion.

RESPONDENT'S SUBMISSIONS

12. Having outlined the facts of the case that led to the present Appeal, the Respondent opted to submit on the three grounds of appeal jointly. Firstly, it was submitted that a case has to be made for this court to interfere on the award made by the lower court, and more specifically, it has to be shown that the trial court either acted on some wrong principle of law, or that the award was inordinately high or that the trial court misapprehended the evidence. It is upon those three grounds, that the Respondent opines, that this Court can then alter the finding of the trial court if so satisfied. This view was buttressed by an excerpt from the case of **Gitobu Imanyara & 2 Others –vs- Attorney General [2016] eKLR**.

13. On loss of Dependency, the Respondent submitted that the courts have overtime analyzed the income of the future profession of a deceased in line with the study he was pursuing before demise. Some of such authorities adduced by the Respondents include the following cases;

Firstly, the case of **Ireri Moses –vs- Peter Mutugi Muthike (suing as the legal administrator of the estate of the late Mary Njeri Muthike (deceased) [2019]eKLR**, where on similar circumstances the court thus stated;

“The issue of speculation which the appellants have used cannot be upheld considering that that evidence which was undisputed was that the deceased was aged 23 years and was a student at Moi University. She had a definite career path. Upon finishing and cannot be said that her future career was speculative”

A similar approach was followed by the court in the case of **Joshua Mungania & Another –vs- Gregory Omondi Angoya [2018] eKLR**. In that case, the deceased was aged 23 years and was a 4th year student at **Chuka University College**. Therein, the Court held that;

“Our law reports are replete with case where the court has extrapolated the earning of the deceased from the nature of education

and expected career path (see for example the case of Richard Osoro Jindiga –vs- Alex Thangei and Another NRB HCCC No.42 of 2007 [2013] eKLR). The issue really is one of evidence and common sense as the court of Appeal observed in Kenya Breweries Ltd –vs- Saro MSA CA Civil Appeal No. 144 of 1990 [1991] eKLR;

14. Based on the above-cited authorities, it was submitted that the deceased was set to graduate as a Computer Scientist within two years had he not passed away, and then venture into employment by virtue of his profession. As such his future could not have been said to be speculative. This Court was then urged to adopt the multiplicand guided by the **2017-2018** college salary report guideline, according to which a Computer Scientist graduate would earn a salary of Kshs.70,000/=.

15. Since that was the approach taken by the trial court, the Respondent pleaded with the court not to disturb the finding by the lower court. To support this line of argument, the Respondent referred this court to consider the case of **Rosemary Mwasya –vs- Steve Tito Mwasya & Another [2018]eKLR**, where the Court of Appeal upheld the monthly salary of Kshs.118,546/= based on a salary survey extract where the deceased was a student studying accountancy.

16. Lastly, it was submitted that the Appellants had not adduced any evidence to show that in assessing the damages, the trial Magistrate took into account an irrelevant factor leaving out relevant ones and therefore this court should be reluctant to disturb the award on damages by the trial court which is an exercise of judicial discretion.

ANALYSIS AND DETERMINATION

17. I have considered this Appeal, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned Judgment. It is note worthy that the Appeal challenges part of the lower court Judgment on award of damages and to be more specific, the award on the sub-head for loss of dependency.

18. I have however, identified the following issues for determination. *First, is the question as to whether the trial court acted on wrong principles arising at the award of damages for loss of dependency, and, if the above is answered in the affirmative, which sum would be sufficient compensation in the circumstances.*

19. Firstly, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, draw a conclusion from that analysis while bearing in mind that the appellate court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor.

20. Further, **Section 78** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, espouses the role of a first appellate court which is to '... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' The position was buttressed by the former East Africa Court in the case of **Selle –vs- Associated Motor Boat Co. [1968] EA 123.**

21. Having stated that this court in exercise of its appellate jurisdiction can review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand, I should also add that this jurisdiction should be exercised with caution. So that, if an appellate court is of the view that there is no evidence to support a particular conclusion, which is a question of law, then the court should not hesitate to so decide.

22. However, if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial then this court, as an appellate court will bear in mind that it has not enjoyed the opportunity see and hear the witnesses and that the view of the trial court as to where credibility lies is entitled to great weight.

23. It is the Appellants' case that the trial court applied the wrong principles in regard to the award, particularly on loss of dependency, by applying the wrong multiplicand of Kshs.47,000/= having taken into account the issues on taxation. The Appellants seem not to be aggrieved on the multiplier of 25 years and the dependency ratio of $\frac{1}{3}$ adopted by the trial court and hence, I have no reason to disturb that finding.

24. The Appellants submitted that deceased had not graduated and was employed as a radiation technician. Therefore, there was no basis of employing a salary of Kshs.70,000/= which the trial court considered was the starting salary for an upcoming Computer Scientist and instead urged that the court should have used the salary which the deceased was earning as radiation technician as the multiplicand.

25. They went on to submit that since the Respondent had not proved what salary the deceased was earning as radiation technician, then the court ought to have adopted the basic minimum salary which in their view is Kshs.9,000/=. In trying to differentiate the case of **Ishmael Nyasimi & Another –vs- David Onchagu(supra)** which the trial court relied on to reach its multiplicand, the Appellants submitted that in that case, the deceased had already graduated but was unemployed while in the present case, the deceased was yet to graduate and owing to the high rate of unemployment he was more likely than not to remain unemployed even after graduation.

26. The Respondent on the other hand, denied that the trial court applied the wrong principles in awarding the quantum. And while reiterating the **Ishmael Nyasimi case (supra)**, submitted that the survey on salaries for the profession the deceased was pursuing was applicable in determining the multiplicand. The same view was also adopted by the Court of Appeal in the case of **Rosemary Mwasya –vs- Steve Tito Mwasa (Supra).**

27. Ordinarily, a court on Appeal will normally not interfere with the exercise of discretion by the trial court when assessing damages unless it is satisfied that the trial court took into account an irrelevant fact or left out of account a relevant fact; or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

28. Nonetheless, an award of damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards

made in past comparable injuries while taking into account other relevant factors such as influx of time. I will therefore consider some of the relevant factors other courts have considered relevant in determining the multiplicand.

29. First, in the case of **Ishmael Nyasimi & another v David Onchangu Orioki (Suing as personal representative of Antony Nyabando Onchango (Deceased) [2018] eKLR**, the High Court while dealing on almost a similar set of facts save for the fact that in that case the deceased had already graduated as an engineer although unemployed expressed itself as follow;

“Thus there is no reason why the trial court could not rely on the salary of a graduate engineer from a public firm employing graduate engineers to determine the multiplicand”

30. In the case of **Leonard Ochar Otieno –vs- Mathews Mwanza Wanga (Suing as the legal administrator of the estate of Kennedy Owino Wanga (deceased) [2020] eKLR**, the deceased therein was at the time of the accident, aged 21 years and a student at Egerton University, studying to be a high school teacher. Therein, the court in adopting the salary which had been proved as the salary of a secondary school teacher in a previous case, held thus;

“The court ought to have considered the salary applicable to teaching profession. In the circumstances, it is my finding that the amount of Kshs.38,000.00, based on the decision above, would have been the sufficient multiplicand in the circumstance”

31. In the case of **Steve Tito Mwasya & Another (both suing as legal representatives of the estate of S K T (Deceased) –vs- Rosemary Mwasya, NRB HCCC No.221 of 2011 [2015] eKLR**, the deceased was 19 years old at the time of her death who was a student at Strathmore University studying accounts and was also studying Bachelor of Commerce at the University of Nairobi. The Plaintiff presented documents showing that the deceased undertook learning towards the study of accountancy or finance. In determining the multiplicand, the trial Judge relied on the appropriate salary of an Accountant or Finance Officer from the extract of the Salary Survey of Kenya. Aggrieved by that finding, the Defendants appealed and when the matter went to the Court of Appeal, the Court of Appeal upheld the trial court’s assessment of the multiplicand where the trial court had recourse to other evidence to establish what the deceased would have earned and observed that:-

“As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs.118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions.”

32. Lastly, the Court of Appeal in the case of **Roger Dainty –vs- Mwinyi Omar Haji & Another, MSA Civil Appeal No.59 of 2004 [2004]eKLR**, expressed itself thus;

“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”

33. From the foregoing and in light of the authorities I have cited above, it cannot be said that the mother of the deceased was speculative owing to the fact that he had not graduated. The undisputed evidence on record is that the deceased was a student at the Technical University of Mombasa where he was pursuing a Bachelor of Science degree in Mathematics and Computer Science, and was well on his path to graduating within two years had the death not occurred. At no point did the Appellants discredit that evidence.

34. I therefore find no fault in the trial court having adopting the multiplicand of the deceased’s future income in his chosen career path. The learned trial Magistrate was well guided by the **2017-2018** College Salary Report to

ascertain the salary applicable to a Computer Science graduate as that was the profession the deceased would have pursued had death not claimed his life. The trial Magistrate was also right in taking into consideration the element of taxation before arriving at the final figure and I see no reason why I should substitute my discretion to that of the trial Magistrate.

35. I however, decline the invitation by the Appellant to consider that the deceased would even have continued to work as a radiation technician even after his graduation on ground of the Respondent’s testimony that she has been a single mother with no income that the deceased had been pushed by circumstances to find side hustle jobs for his upkeep. Ultimately, he would focus on his career upon graduation and the argument that given the high rate of un-employment he was unlikely to find a job is neither here nor there as the same is based on mere speculation.

36. Having analyzed the Record of Appeal and the submissions by both parties, I am not persuaded that the trial court fell into any error in the manner it assessed damages under loss of dependency under the **Law Reform Act** and hence, see no reason to disturb the same as it is not unreasonable in the circumstances.

37. In an upshot, I am not persuaded that the Appellants have established a case for this court to interfere with the Judgement of the trial court in their favour. Accordingly, the Appeal herein is dismissed for want of merit with costs to the Respondent.

It is hereby so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 25th day of MAY 2021.

D. CHEPKWONY

JUDGE

In the presence of:

M/S Mulongu Counsel holding brief for Mr. Kibara for Respondent

No appearance for and by Appellant

Court Assistant - Winnie