



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. E 040 OF 2020**

**JOSHUA MUNG'ATHIA.....APPELLANT**

**VERSUS**

**EVARICK MUTHURI NTOIBA & ANOR**

**(Suing as the legal representatives of the estate of**

**Fredrick Ntoiba Baraya (deceased).....RESPONDENTS**

**(An appeal from the Judgment and Decree of Hon. G.Sogomo (P.M) in Tigania PMCC No. 62 of 2020) delivered on 03/12/2020)**

**JUDGMENT**

1. Before the trial court was a claim commenced by a Plaintiff dated 08/07/2020 in which the respondents sued the appellant seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages and costs of the suit.

2. The gist of the claim was that on or about 06/03/2020 the deceased was lawfully walking on the roadside along Maua-Meru Road at Muthara Polytechnic area, when the appellant so negligently drove and/or controlled motor vehicle registration number KCB 417 V Toyota, Probox, that it knocked him down thereby occasioning him serious injuries which led to his demise the same day while undergoing treatment. At the time of his death, the deceased was aged 63 years enjoying robust health, he was gainfully engaging as a carpenter and a subsistence farmer earning a net monthly income of Kshs 20,000 out of which Kshs 16,000 would be spend every month on his large family. That he endured a lot of pain before he succumbed to the injuries and he lost expectation of life as a result of the said accident. By his death, his dependants who relied on him wholly have lost the support accorded to them by the deceased and his estate has similarly suffered loss.

3. The appellant vehemently denied the claim by his statement of defence dated 13/08/2020 and prayed for the respondents' suit to be dismissed. After trial, the trial court found that the respondents had proved their case on a balance of probability and entered judgement in their favour against the appellant as follows:

a) Pain and suffering = Kshs 40,000

b) Loss of expectation of life = Kshs 100,000

c) Loss of companionship = Kshs 100,000

d) Loss of dependency  $20,000 \times 7 \times 12 \times \frac{2}{3} =$  Kshs 1,120,000

e) Special damages = Kshs 100,930

Less 20% contribution

Total = **Kshs 1,168,744**

4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 23/12/2020 listing six (6) grounds of appeal. As framed, the grounds are not succinct enough as dictated by the provisions of Order 42 Rule 2(2) and it is important that parties and counsel just accept it as a legal duty to comply with the rules so that not so much energy is spent in trying to discern the grievance by an appellant.

5. Having said that, a reading of the grounds shows that the appellant's complaint is four pronged;

- a) that the trial court erred in awarding inordinately high damages
- b) that damages awarded included those that had neither been pleaded nor proved leading to a miscarriage of justice
- c) that the trial court erred by failing to consider the appellant's submissions and authorities cited
- d) the trial court's judgement as a whole is not supported by the evidence that was tendered in court by the parties.

6. This being a first appeal, this court is duty bound to re-evaluate, reappraise and re-examine the entire case afresh and come to its own independent findings and conclusions bearing in mind that it did not have the advantage of seeing the witnesses testify. See **Peter M. Kariuki v Attorney General [2014] eKLR**.

7. In evidence **PW1 Evarick Muthuri Ntoiba**, the sole witness to ever testify in the matter, told court that his deceased father who had died in a road accident on 06/03/2020 was a carpenter and a subsistence farmer making Kshs 20,000 which he used to support his family. That he was a strong and healthy man aged 63 years and that they interred his remains at their home at Uru on 13/03/2020 thus incurring burial and other expenses and that by his death, they had also lost the support he was giving them. He produced the documents listed in the plaintiff's list of documents dated 08/07/2020 in support of their case and sought for damages and costs. During cross examination, he denied knowing whether the deceased had gained any specialized education on his carpentry work and confirmed that the deceased earned Kshs 20,000 which he used to support his two wives and his unemployed children who entirely depended on him. During re-examination, he stated that their last born namely Brenda Kagwiria was in class 6.

8. Although the appellant had recorded and filed a witness statement dated 30/10/2020, he elected to close his case without calling any witnesses. To that extent his pleadings stood unsupported at the end of production of evidence but the saving grace come from the consent recorded on liability.

9. Upon the directions by the court on 21/02/2021, the parties filed their respective submissions in urging the appeal on 27/04/2021 and 07/06/2021 respectively. The appellant's submissions were to the effect that the damages awarded to the respondents were inordinately high considering that dependency was not proved. It was concluded that a grand award of Kshs. 227,026.24 would sufficiently compensate the respondents.

10. The appellant cited the cases of **Mwita Nyamohanga & anor v Mary Robi Moherai (suing on behalf of the estate of Joseph Tagare Mwita-deceased) & anor (2015) eKLR**, **Hyder Nthenya Musili & anor (suing as the legal representatives of the estate of Collins Mumo Mbundyo-deceased) v China Wi Yi Ltd & anor (2017) eKLR**, **David Bore v Johnson Masika(2004) eKLR** and **Hardev Kaur Dhanoa (suing as the legal representative of the estate of Harminster Singh Dhanoa-deceased) v Multiple Haulers(E.A) Limited (2017) eKLR** in support of his case and submissions that damages were exorbitant and stressed the fact that damages for loss of companionship was never pleaded nor proved.

11. On their part, the respondents maintained that the award was reasonable and urged the court not to disturb it. The cases of **Susan Munyi v Keshar Shiani (2013) eKLR**, **Joseph Kahiga Gathii & anor (suing as the administrators of the estate of Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga-deceased) (2014) eKLR**, **Abdalla Issa & anor v Leonida M. Alusa & anor (2019) eKLR** and **Salvatore De Luca v Abdullahi Hemed Khalil & anor (1994) eKLR** were relied on in support of their position that the sums awarded by the trial court under all the headings were justified and reasonable in the circumstances.

12. It is firmly established that an appellate court will only interfere with the trial court's discretion on the assessment of damages if it is satisfied that the trial court took into account an irrelevant factor or left out of account a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. See ( **Hellen Waruguru Waweru [Suing as the Legal Representative of Peter Waweru Mwenja [Deceased] V Kiarie Shoe Stores Limited [2015] eKLR** ).

13. I propose to handle the four questions in a seriatim manner and order set herein. The appellant's first grievance is that the awarded damages were inordinately high. In the submissions filed, the attack is aimed at two heads of damages being pains and suffering as well as loss of dependency.

14. From the onset it must be remembered that it takes a very strong case of improper exercise of discretion for an appellate court to disturb a discretionary verdict<sup>[1]</sup>. It is never enough that the appellate court or indeed any other court could have awarded a different figure<sup>[2]</sup>. In fact, the law is that it is not open for the appellate court to substitute its discretion for that of the trial court. Based on and applying those principles of law which I find indubitable, to the award for pains and suffering, I note that to the trial court were cited decisions by the High court that made awards ranging between Kshs 10,000 and 50,000. When faced with such, the trier of facts, in exercising discretion was not bound to accept one and discard the other. He retained his duty to assess and award damages, known to be a very difficult task<sup>[3]</sup>, and carried out its mandate. That is what I find the court to have done and I am precluded from substituting my discretion for that of the trial court. I find no merit in the invitation to interfere with that limb of the award and I dismiss it.

15. The second limb is that on the award for lost dependency. The determination of this issue calls for the review and re-evaluation of the evidence led to establish if, the multiplier formula was properly invited and employed, whether there was proof of dependency and if the multiplicand used was properly arrived at. The 1<sup>st</sup> respondent in his witness statement which was adopted as his evidence in chief said: -

**“The late Fredrick Ntoiba Baraya was my father. He died in a road accident on 06/03/2020. He was 63 years old. He was a carpenter and subsistence farmer. He was making Kshs20,000 per month which he was supporting the family with. The**

deceased was a strong and healthy man. By his death, we as a family have lost the support that the deceased was giving us.”

16. The 1<sup>st</sup> respondent in addition affirmed that position during cross examination went on to state that, **“My other siblings are unemployed and they used to depend on the deceased. The deceased had 2 wives and used to cater for his family.”**

17. It is brazenly clear that while dependency was alleged, the extent thereof was never established. It then rested upon the trial court to determine if the evidence led proved dependency to its satisfaction. In discharging that mandate I do find that it was never done properly. The approach a court gives to the evidence in such a case was succinctly set out by Ringera J in **Beatrice Wangui Thairu vs Ezekiel Barngetuny, NBI HCC 1638 of 1988**. The court was duty bound to establish the value of the annual dependency based on the earning of the deceased as was available to the dependants, then multiply that with a reasonable figure representing the years bought. The record reveals that the trial court relied on the provisions of section 3 Cap 405 and the Regulation of Wages Order, 2018 and settled on a sum of 20,000 per month. I find that to have been an error in that the applicable Order did not set the minimum wage of a carpenter at Kshs 20,000. It appears to me that while the trial court was following the path he found **“illuminated by statute and the Regulation of wages (General Amendment) Order 2018,”** failed to apply the appropriate trade of the deceased and the assigned wages.

18. I have had a chance to peruse the 2018 Order and I find that the minimum wage for a carpenter (ungraded artisan) in all other areas was 13,975.55. That is the sum the court ought to have adopted as a multiplicand.

19. In the judgment, the court chose a dependency ratio of 2/3 to mean the deceased used one third of his income and devoted the rest to his family. On my part I find it inconceivable, if not wholly immoral, that adult able bodied children would be encouraged to rely on an old man of over 60 years, past public service retirement age, for support. Such practice if it in deed exist must be discouraged as encouraging irresponsibility and unduly burdening senior citizens. With such concern and it being the law that dependency is a matter of evidence as there is no dogma that one devotes at least two thirds of his income to support others, I do find that adult able bodied children ought not to have been dependent upon the deceased for their livelihood and subsistence. I find that in the absence of proof of how much the deceased availed to his family on regular basis, I would adopt the relevant minimum wage and a dependency ratio of one third. I choose not to disturb but uphold the multiplier adopted by the trial court. Having done so, the award under this head calculates as follows:

$$13975.55 \times 7 \times 12 \times 1/3 = 391,315.40$$

20. The next question is whether it was right to award the damages for lost companionship when the same was never pleaded nor was evidence led on it. The obvious answer to that question is a resounding NO. It is the law that a court of law can only determine a dispute placed before it by the pleadings and upon which proof is given by evidence. Short of that, a court may render itself on a question not pleaded but left by the parties, both, for its determination. Parties may leave an unpleaded matter for the determination of the court for example by, framing it as an issue, leading evidence on it without the protest of the other side or by concurrence of both.

21. While addressing the point, the Court of Appeal in **Sarah Jelangat Siele vs. Attorney General & 3 Others [2018] eKLR** held:

**“It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination. See this Court’s decision in Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385. However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court’s decision when a party addresses the court and leads evidence on the issue. See Vyas Industries v Diocese of Meru [1976] eKLR.”**

22. Before the trial court, there was no pleading nor prayer for lost companionship, no evidence was led on it and the parties never framed it as an issue. It was not right that the trial court was persuaded to find and make an award based on the submissions by the respondent to which the appellant had not given its input. I find that the award for loss of companionship was erroneous and I do set it aside in whole.

23. Even on the merits, if there had been a pleading, there was never an iota of evidence on loss of consortium or companionship as the trial court described it. I do agree with the appellant that such loss could only be the loss of the widows who never gave evidence. I find the decision of the Court of Appeal cited by the respondent, **Salvatore De Luca v Abdullahi Hemed Khalil & Another (1994) eKLR** to be of no assistance to them. In that decision there was evidence at trial by the widower touching on the love between him and the deceased wife and the court concluded that appellant and his young children, had lost love, care and devotion of the deceased.

24. The last issue is the fault that the trial court gave no regard to the submissions and authorities cited by the appellant. This grievance, in reality ought not to be taken seriously when regard is taken of the court’s mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a reevaluation in order that it comes to its own conclusions. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant’s submission. While I consider it important that parties’ industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal.

25. In the end the appeal succeeds to the extent that:

a) the award for loss of companionship is set aside in whole

b) the award for loss of dependency in the sum of Kshs 1,120,000 is set aside and in its place substituted and award of Kshs 391,315.40

c) save for the two limbs, the rest of the decision by the trial court is upheld

c) the appellant shall get the costs of this appeal while cost of the trial remains with the respondent.

Dated, signed and delivered at Meru, Virtually **By MS Team, this 25<sup>th</sup>** June 2021

Patrick J O Otieno

Judge

**In presence of**

Ms Oteko for the appellant

Mr. Nkunja for the respondent

Patrick J O Otieno

Judge

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[1] [Peters VsSunday post Ltd \(1958\) EA 424](#)

[2] [Ken Odondi& two others vs James OkothOmburah t/a OkothOmburah& Company Advocates](#)

[3] [Sophinaf Company Ltd And Another Vs Daniel Nganga Kanyi\[2006\]eKLR](#)