



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E13 OF 2021

BETWEEN

NICHOLAS NJAGI.....APPELLANT

(Suing as legal representative of the estate of DORCAS KANANA (DECEASED))

AND

PATRICK MUSYOKI.....1ST RESPONDENT

SAMUEL THEURI.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in Isiolo CMCC No. 76 A of 2016 by Hon. E.Ngigi (PM) on 22nd October, 2020)

JUDGMENT

1. On 12.12.2013 **DORCAS KANANA (Deceased)** was lawfully walking along Isiolo-Meru Road when she was knocked down by motor vehicle **KBT 715T (Prime Mover) ZB 7020 Make FAN (accident motor vehicle)** owned by **Samuel Theuri (2nd Respondent)** which was being driven by **Patrick Musyoki (1st Respondent)** and she suffered fatal injuries.

2. **NICHOLAS NJAGI (Appellant)** in his capacity as husband to the deceased filed suit against Respondents seeking damages.

3. The Defendants/Respondents in their statement of Defence denied the claim and sought to rely on the doctrine of *non-fit injuria*.

4. Subsequently on 29th September, 2020, judgment was entered on liability at 85:15% in favour of the Appellant against the Respondents jointly and severally.

5. At the conclusion of the trial, the learned trial magistrate proceeded to award damages as follows:

1. Pain and suffering	Kshs.	10,000/-
2. Loss of expectation of life	Kshs.	100,000/-
3. Loss of dependency	Kshs.	354,824/-

The Appeal

6. The Appellant dissatisfied with the lower court's decision on quantum preferred this appeal mainly disputing quantum in its totality.

Analysis and Determination

7. I have considered the evidence at the trial and the submission on behalf of the parties and I will address each of the issues raised on appeal as hereunder.

i. Pain and suffering

8. The Appellant also took issue with the sum of Kshs 10,000 that was awarded as damages for pain and suffering. It was not disputed that following the accident the deceased, died on the same day as evidenced by the certificate of death.

9. In regard to the assessment of damages, the principle stated by *Kneller JA* in **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30** at page 35 is instructive:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

10. The general consensus in awarding damages for pain and suffering is that damages are normally assessed on the basis of the length of suffering that the deceased endured before death.

11. I note that in the submissions, the Appellant prayed for Kshs. 150,000 relying on **Moses Akumba & another v Hellen Karisa Thoya [2017] eKLR** where the court on appeal upheld an award of Kshs. 50,000 awarded for pain and suffering for a deceased that died immediately after the accident. Respondents on the other hand proposed Kshs. 10,000/- and relied on **Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR** where the court awarded Kshs. 10,000/- under this heading. I note that both decisions are persuasive and considering that the decisions are over 3 years old, I revise the award to Kshs. 30,000/- under this heading.

12. In **Benham vs Gambling, (1941) AC 157** it was held that only moderate awards should be granted under this head for the following reasons:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

13. For loss of expectation of life, the Appellant proposed a sum of Kshs. 200,000/- and placed reliance on **Moses Akumba & another v Hellen Karisa Thoya** (supra) where similar sum was awarded. Respondents on the other hand offered Kshs. 100,000/- and relied on **Hyder Nthenya Musili & another v China Wu Yi Limited & another** (supra). The trial court awarded Kshs. 300,000/ which amount I find reasonable and comparable with the cited cases.

14. Concerning loss of dependency, the Appellant maintains that the trial magistrate misapprehended the evidence by adopting a dependency ratio of 1/3 instead of 2/3 yet deceased was married with children and a multiplier of 17 years instead of 27 yet deceased was 33 years and might have worked until 60 years. Reliance was placed on **Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A (minor suing through her next friend I A I S) & 3 others [2018] eKLR** where the court adopted a multiplier of 20 years for a 17-year-old student. In **Josephine Nyawira Karani & another v John Ndirangu & 2 others [2015] eKLR** cited by the Respondents, the court applied a multiplier of 18 for a 33-year-old victim. Bearing in mind the *vicissitudes* and uncertainties of life, I am persuaded to interfere with the multiplier adopted by the trial court and the enhance it to 20 years.

15. On the issue of dependency ratio, Appellant testified that he was deceased’s husband and that they were blessed with two children. The trial court dismissed this evidence on the ground that the Appellant did not produce a certificate of marriage and certificates of birth of the two children.

16. The Court of Appeal in **Jacob Ayiga Maruja & Another vs Simeon Obayo, [2005] eKLR** where the Court while addressing the question on failure to adduce proof of income stated as follows;

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving 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. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

17. On the basis of the foregoing decision, I find that production of certificates is not the only way of proving that one is married and has children. Consequently, I set aside the dependence ratio of 1/3 and substitute it with 2/3.

18. In the final analysis, this appeal has merit and it is allowed in the following terms:

1. Multiplier of 12 years is set aside and substituted with a multiplier of 20 years
2. Dependence ratio of 1/3 is set aside and substitute it with 2/3.
3. Appellant will have costs of the Appeal

DATED AT MERU THIS 23RD DAY OF SEPTEMBER,2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - Mr.Kaaria for Kaimba for Kaimba Peter & Co. Advocates

For Respondents - Ms. Oteko for Kiruki Kayika & Co. Advocates