



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 2 OF 2018

MARGARET NJERI MWICIGI.....APPELLANT

VERSUS

ROSE NYAMBURA KAMANDE (suing as the administrator of the estate of

MICHAEL KIARIE NJOROGE – DECEASED).....RESPONDENT

(Appeal against the judgment of the Chief Magistrate's Court at Thika, G. Omodho, SRM in the Succession Cause No. 635 OF 2015 dated 15th December, 2017)

JUDGMENT

1. **ROSE NYAMBURA KAMANDE** the respondent sued before Thika Chief Magistrate's Court *as administrator of the estate of Michael Kiarie Njoroge (Deceased)* following a road accident on Nairobi-Thika Superhighway where the deceased was a pillion passenger on motor cycle registration NO. KMCF 279G. The accident occurred on 4th March, 2013.

2. The respondent sought before the trial court damages against the appellant under the Fatal Accident Act Cap. 32 and the Law Reform Act, Cap. 26.

3. On 16th November, 2016 before the trial court, the parties entered into a consent judgment on liability at the ratio of 80:20 in favour of the respondent. The trial court on receipt of the respondents evidence, and the appellant having not offered any evidence entered judgment on quantum as follows:-

- Loss of dependency - Kshs.2,304,000/=
- Pain and suffering - Kshs. 100,000/=
- Special damages - Kshs. 41,300/=
- Loss of expectation of life - Kshs.100,000/=
- Less contributions of 20% i.e. Kshs. 509,060/=.

Total - Kshs. 2,036,240/=

4. The appellant has raised the following grounds of appeal:-

1. *The trial magistrate erred in law in making an award that was not adequately supported by the documents produced before the court.*
2. *The learned trial magistrate misdirected himself and erred in fact and law by using a multiplicand that was not supported by evidence and was inordinately high in the circumstances of the case.*
3. *The learned trial magistrate erred in making an inordinately high award under the Law Reforms act more so as it related to pain and suffering.*

4. The learned trial magistrate erred in law by making an award that was too high as to amount to a completely wrong estimate.

5. I will be guided in my determination of this appeal by the principle in the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123** as follows:-

“An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”

6. The respondent stated in evidence that she was the wife of the deceased. She got married to deceased in 1996 and they were blessed with three children. The deceased was 43 years old. He was employed as a tout in the public transport. He earned Kshs.1,000 per day. He used his earnings to support his family.

7. The appellant submitted on the first and second ground of appeal together. Appellant submitted that the respondent failed to prove that the deceased was earning Kshs.1,000/= per day. Appellant therefore submitted that the trial court erred in using the amount of Kshs.1,000 per day in the multiplicand. It was the appellant view that the trial court should have adopted the **Regulation of Wages (General) (Amendment) Order 2012** and should have used the amount of Kshs.10,687.96 as the multiplicand.

8. The respondent in evidence stated that the deceased earned Kshs.1000 per day as a tout in the public service transport business. The trial court was convinced of that evidence, and that being so, the respondent met the civil standard of proof as stated in the **CASE STRAIGHT SECURITY SERVICES LTD VS. SHONGHAO OVERSEAS CONSTRUCTION ENGINEERING LIMITED (2021) eKLR** thus:-

“11. Having perused the evidence adduced at the trial court, I am satisfied that the Security Firm met the Civil Standard of proof, on a balance of probability. That standard of proof was considered in the CANADIAN CASE R. VS. LAYTON, 2009 SCC 36 (CanLII), [2009] 2 SCR 540 as follows:-

‘4. What does “proof on balance of probabilities”

mean? It does not mean proof beyond a reasonable doubt - that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not - that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”

9. It is useful to consider what was stated in the case **JACKSON MWABILI VS. PETERSON MATELI 2020) eKLR** where the court had this to say when there was absence of records of earning:-

“43. The Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in WAMBUA V PATEL & ANOTHER [1986] KLR 336, where the court had found the plaintiff had not kept proper records of what he earned but stated:-

‘Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method’ But a victim does not lose his remedy in damages because the quantification is difficult.”

10. It follows that grounds number 1 and 2 of the appeal are rejected. The trial court did not err for the respondent met the civil standard of proof and did prove the earnings of the deceased.

11. The appellant submitted in support of the third ground of appeal that the trial court erred in awarding Kshs.100,000/= for pain and suffering because there was no evidence when the deceased succumbed to his injuries. This award is, however, supported by the cases **FARAJA MOHAMED VS. TAWFIQ BUS SERVICES & 2 OTHERS (2007) EKL** **BIDII MUIIMI & ANOTHER VS. PATRICIA MUNANIE MUTEMI & ANOTHER (2020) eKLR** and also **BENEDETA WANJIKU KIMANI VS. GHANGWON CHEBOI & ANOTHER (2013) eKLR**. Those cases clearly show that an award of damages under the Fatal Accidents Act for pain and suffering are conventionally awarded at Kshs.100,000. It follows therefore that the third ground of appeal is also rejected.

12. Similarly, the fourth ground of appeal does fail because it is now settled that one who is awarded damages under the Fatal Accidents Act is not denied an award under the Law reforms act. See the case **MINI BAKERIES (NAIROBI) LIMITED VS. OSCAR OGADA ORENGO & ANOTHER (2018) eKLR** as follows:-

“14. The principal does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act hence the issue of duplication does not arise regarding that aspect of the award. The Court of Appeal clearly elucidated this point in HELLEN WARUGURU WAWERU suing as the legal representative of PETER WAWERU MWENJA (DECEASED) V KIARIE SHOE STORES LIMITED NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR where it stated that:-

‘[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some

courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.'"

CONCLUSION

13. All the grounds of appeal having failed, this appeal fails and the same is dismissed with costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 25th day of NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For Appellant: Mr. Mbigi

For Respondent: Ms. Mwaura holding brief for Mr. Nyanga

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE