



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.243 OF 2017

JESSE GICHURU WANYAMA.....1ST APPELLANT

NDUNGU STEPHEN.....2ND APPELLANT

VERSUS

VIDELIS AUMA WANYAMA alias NANCY WANYAMA

& CHRISTABEL ONDECHERE OSIRO (suing as the administrator of

the estate of WISTON SIRO MALOBA.....RESPONDENT

(Being an appeal from the judgment/decree of the Honourable Ocharo,

Senior Resident Magistrate Nairobi delivered on 30th November

2020 in Nairobi CMCC No.2377 of 2014)

JUDGMENT

1. The respondents filed a suit in the lower court seeking general damages under the Law Reform Act and the Fatal Accidents Act (FAA) on behalf of the Estate of Wiston Siro Maloba pursuant to a fatal road accident on 11th May 2012 along Jogoo Road. They also prayed for special damages, costs of the suit and interest.

2. The appellant filed his statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondents and assessed damages as follows;

- Pain and Suffering.....Kshs.50,000/=
- Loss of expectation of life.....Kshs.100,000/=
- Loss of dependency..... Kshs.3,949,440/=
- Total.....Kshs.4,099,440/=

3. The appellant being aggrieved preferred this appeal and put forward the following grounds:

- a) That the learned trial magistrate erred in fact and in law in holding the defendants 100% liable when the plaintiff's witnesses gave evidence which was uncorroborated.*
- b) That the learned trial magistrate erred in both law and fact in finding that the respondent was entitled to General damages for Pain and suffering Kshs.50,000/=, Loss of Expectation of Life Kshs.100,000/=, loss of dependency Kshs.3,949,400/= plus costs and interests.*
- c) That the learned Trial Magistrate erred in fact and in law in failing to consider the appellants' submissions.*
- d) That the learned trial magistrate erred in law and in fact by awarding damages that were so inordinately high in view of the*

circumstances of the case.

e) The Learned Trial Magistrate erred in law by failing to consider conventional awards for similar cases.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The appellants on the issue of quantum submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding Kshs.50,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life and Kshs.3,949,440/= for loss of dependency that is inordinately high and excessive.

6. On pain and suffering the appellant submitted that the evidence adduced is that the deceased died on the same day of the accident and therefore an award of Kshs.10,000/= would have been adequate compensation under this head. On this the appellant relied on the case of **Dominic Kiongerah (Suing as the legal Administrator of the Estate of the Late Magdaline Njeri Kiongerah) v Zacharia Wachira Gatiga & Another (2018) eKLR.**

7. On the issue of Loss of expectation of life, appellant submitted that under this head is based on the principle that the deceased had been deprived of the normal expectation of life. In this case PW3'S evidence that the deceased was 25 years old and that an award of Kshs.80,000/= would have been adequate compensation for the same.

8. On the claim for Loss of dependency, the appellant submitted that this being the bone of contention in this appeal is the award of Kshs.3,949,440/= where the trial court erroneously adopted the renowned multiplier approach/formulae which is usually used to determining loss of dependency.

9. The appellant further pointed out that the trial court adopted a multiplier of 34 years using a multiplicand of Kshs.19,360/= as basic minimum wage for an artisan .The appellant submits that a multiplier of 23 years would be reasonable consideration of vicissitudes and vagrancies of life as the deceased was an intern at Finech Limited who assisted his two siblings by paying their school fees, was not married and did not have children.

10. On this appellant relied on the case of *Chania Shuttle v Mary Mumbi (2017) eKLR.*

“Indeed, it is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependant on a deceased prior to his death. Appreciably, in an African setting, it is expected that an adult child will assist his aging or aged parents.

In this case, there was nothing that was placed before the Trial Court to demonstrate that the deceased’s children were dependent on the deceased. As they were African adult children, it was not unreasonable to have expected that they were the ones who were actually assisting the deceased and not the deceased assisting them. This court was therefore agreed with the Appellant that the Respondent did not prove dependency of her adult children on the deceased prior to his death and that her assertion that he used to pay school fees for them was a misrepresentation and untenable.”

11. In response, the respondents gave a brief facts of the matter and identified three issues for determination as follows:

i. Whether the appellants record of appeal is incompetent due to failure to include the decree appealed against

ii. Whether the trial magistrate erred in law and in fact in apportioning liability at 100% in favour of the respondent as against the appellants

iii. Whether the trial courts assessment of general damages was inordinately high.

12. On the first issue, the respondent submitted that the appellants failed to include the decree they were appealing against as it is a requisite document which if omitted renders the appeal incompetent and fatally defective for failing to meet the mandatory requirements of the Civil Procedure Act and Rules 2010. The respondent further submitted that it is an incompetent record of appeal and that this Honourable court cannot determine this appeal. On this argument the respondent relied on the case of **Nancy Wamunyu Gichobi v Jane Weir Gichobi (2018) eKLR** held as follows:

“The record of Appeal has indeed not included the decree appealed against. It is an omission which goes to the substance of the appeal and the real issue in dispute and cannot therefore be wished away as a procedural requirement and therefore a technicality.....I find that failure to indicate decree is fatal. The appeal is incompetent.”

13. On the second issue, the respondent pointed out that the appellants did not call any witness to testify in support of their case during the hearing of the trial court and therefore making the respondents’ witnesses testimonies uncontroverted hence justifying the apportioning of liability at 100% in favour of the respondents against the appellants.

14. The respondent therefore contends that they proved their case on a balance of probabilities since their evidence in the trial court was uncontroverted and hence unchallenged. On this the respondent was guided by the decision of Justice F **Muchemi in Wilson Matu & another v Stanley Muriuki Wamugo (2021) eKLR** in which it was held as follows:

“The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere assertions.

.....it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.....”

15. On the third issue regarding general damages for pain and suffering, the respondent submitted that PW2 testified that the deceased died on his way to Kenyatta National Hospital hence he underwent immense pain and suffering between the time of the accident and his death.

16. It is the respondent’s submissions that the amount of Kshs.50,000/= awarded by the trial court for pain and suffering was within the limits provided and not inordinately high considering the circumstances of the case. On this the respondent relied on the case of ***Hyder Nthenya Musili & Another v China Wu Yi Limited & Another (2017) eKLR*** held as follows:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. In the present case PW1 and pw2 testified that the deceased died at the scene of the accident and I find that an award of Kshs. 10,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life is reasonable.”

17. On the issue of award of loss of expectation of life, the respondent submitted the conventional award for the same is Kshs.100,000/= which is was awarded in the trial court and is not inordinately high .He therefore urges the court to uphold the trial court’s award of Kshs.100,000/= being for general damages for loss of expectation of life.

18. On the issue of general damages of Kshs.3,949,440/= for loss of dependency, the respondent submitted that the trial court having had adopted a multiplier of 34 years since the deceased was 26 years and that he would have worked until retirement at the age of 60 years. The respondent was guided by the decision in ***Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainana) deceased v Elijah Adellah (2015) eKLR*** in which a multiplier of 35 years for the deceased who died at the age of 28 years.

19. The respondent also avers that the trial court adopted a dependency ratio of ½ as the deceased assisted the parents and siblings financially being the first born child. On this the respondent was guided by decision of Hon.Justice Richard Mwongo in ***Joseph Ndirangu Thuo & Another v Kamau Ngugi (suing as the legal administrators of the estate of Peter Waweru) (2019)eKLR*** in which a dependency ratio of ½ was adopted for an unmarried deceased person with no children. Hon. Justice Richard Mwongo in the same case also quoted in approval the following decisions in which a dependency ratio of ½ was adopted for unmarried deceased persons who had no children but were supporting their parents and siblings financially.

20. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that.

21. I have considered the contending submissions and authorities cited on appeal. I have likewise re evaluated the material placed before the trial court. I find two issues falling for determination namely;

i. Whether the appellants were 100% liable for the accident.

ii. Whether the award of damages was excessive as claimed.

22. On the first issue, the judgment delivered on 19th April 2017 the trial court found the appellants herein to be 100% liable for the accident .PW1 testified that the accident occurred on 11th May 2021 and that the driver of the said motor vehicle did not stop after the accident.

23. In cross examination PW1 confirmed that the accident herein was hit and run fatal traffic kind of accident and that the owner of the motor vehicle was charged on 8th February 2013.

24. PW4 testified that the said motor vehicle was being driven very fast and hit the deceased who was standing at the stage.

25. During the hearing also PW3 produced a copy of records for the said motor vehicle registration number KAS 024Q as PEX-5 which clearly showed that the owner of the vehicle was the 2nd appellant.

26. It is also clear from the record that appellants did not call any witness to testify in support of their case during the hearing in the trial court. It is therefore clear that the testimonies of the respondents were uncontroverted thus justifying the trial court decision of to apportion liability at 100%.

27. I am persuaded by the case of ***Shaneebal Limited vs County Government of Machakos [2018] eKLR***, where ***Odunga J.*** relied on the cases below in reaching his judgment. In ***Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein,

the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

28. I now move to the second issue which is on the award of damages. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR**

29. The trial court awarded Kshs. 100,000/= for Loss of Expectation of Life and Kshs. 50,000/=for Pain suffering both under the Law Reform Act. It was pleaded that the deceased died on his way to hospital. The evidence of PW2 was that deceased died on his hands on the way to Kenyatta National Hospital and that he went through immense pain and suffering between the time of the accident and his death.

30. In my view the award of Kshs. 50,000/= for pain and suffering is not manifestly excessive in the instant case and is in line with awards given in similar cases.

31. The trial court awarded Kshs. 100,000/= for loss of expectation of life. In the case of **Mercy Muriuki & Another –Vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the Court observed that: -

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

The appellants submitted that the award of Kshs.80,000/= to be adequate compensation. In my view the award of Kshs.100,000/= to be adequate

32. The deceased was a 25 year old who was a diploma holder in Technical Education programme as PEX-6 and was an intern at Fintech Company Limited earning a sum of Kshs.20,000/=per month. That the trial magistrate applied a multiplicand of Kshs.19,360.50 according to the Regulation of Wages Order 2012. The court also used dependency ratio of ½ and multiplier of 34 years.

33. On the other hand the appellants submitted that a multiplier of 23 years would have been reasonable as well as dependency ratio of 1/3 reason being that the deceased was not married and had no children.

34. I have keenly looked at the arguments for and against the use of multiplier and the superior court have been split on the appropriateness of the multiplier approach in such cases and as such the lower court cannot be faulted for choosing on over the other.

35. In the case of **Crown Bus Services Ltd & 2 Others v Jamila Nyongesa and Amida Nyongesa (Legal Representative of Alvin Nanjala (deceased) (2020) eKLR** where the court stated thus: -

*“In this case in the absence of any debilitating health concerns the court shall make only a small reduction of four (4) years on the public sector retirement age of 60 so that the multiplier of 35 years is used in the computation. The court notes that in one decision relied on by the appellant herself, namely **West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR**, a multiplier of 33 were used for a deceased aged 21 years as in the present case. The deceased herein working in the private sector may well have worked beyond the retirement age of 60.”*

36. Accordingly, I find no basis to interfere with the trial Magistrate’s discretion of using the multiplier approach and assessing the loss of dependency at Kshs.3,949,440/=.The minimum wage of Kshs.19,360.50/= was as per the basic minimum wage for an Artisan Grade 1 as per Regulation of Wages (General) Amendment Order 2012.The multiplier of 34 years and the dependency ratio of ½ are reasonable in my view.

37. The upshot is that the awards made by the trial magistrate should not be disturbed.

38. The Appeal has no merit, the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant**

.....**for the Respondent**