



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 117 OF 2017

BETWEEN

NANCY WAMBUI NDUNGU.....1ST APPELLANT

HOLIDAY CARS & TOURS LIMITED.....2ND APPELLANT

AND

JOSEPH KAHUKIA WAKIMANI & CECILIA NYAWIRA

(suing as Administrator of the estate of) JIM KIMANI (deceased).....RESPONDENTS

(Being an appeal from the judgment and decree of Hon. D. N. Musyoka,

Principal Magistrate dated 11/7/2017 in Kikuyu CMCC No. 300 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The respondents were the Plaintiffs in Kikuyu CMCC No. 300 of 2016 in which they sued the appellants claiming both general and special damages for the death of the deceased JIM KIMANI who died as a result of a road traffic accident which occurred on or about 15th October, 2006. Liability was settled by consent of the parties at 90% to 10% in favour of the respondents.

2. The parties proceeded by way of written submissions on the issue of quantum and it its judgment delivered on 11th July, 2017, the learned trial magistrate entered judgment as follows:-

a. Pain and suffering	-	Kshs	50,000/=
b. Loss of expectation of life	-	Kshs	100,000/=
c. Loss of dependency	-	Kshs	4,800,000/=
d. Special damages	-	Kshs	33,550/=
TOTAL	-	Kshs	4,983,550/=

Less 10% contribution. The court also awarded costs of the suit to the respondents.

The Appeal

3. The appellants being aggrieved by the above stated judgment have appealed against quantum only on grounds that:-

1. The learned chief magistrate erred in law and in fact in making an award which was manifestly high;

2. The learned chief magistrate erred in law and in fact in not appreciating and/or considering that the only dependants under the Fatal Accidents Act are aged parents and adopted a manifestly high and unjust multiplier;

3. The learned (chief) magistrate misdirected himself by ignoring well settled legal authorities cited by counsel for the appellant in his submissions in which demonstrated the range of awards made by the High Court in fatal claims under similar circumstances;

4. Damages under the Fatal Accidents Act and the Law Reform Act merge and the learned magistrate erred in granting damages under both the Acts.

5. THAT the learned magistrate erred in law and fact in disregarding the exhibits that were produced before court hence arriving at a wrong decision.

4. The appellants' prayer to this court is that the award of the learned Chief magistrate be adjusted downwards.

5. As the first appellate court this court is under a duty to carefully consider the judgment of the learned chief magistrate with a view to determining whether the award made in this case was made in accordance with the laid down principles, taking into account the age of the deceased, his level of education, the age of his parents and the provisions of both the Law Reform Act and the Fatal Accidents Act. This appeal proceeded by way of written submissions.

Appellants' Submissions

6. The appellant's submissions dated 24th October, 2019 were filed in court on the same date. Counsel argued against duplication of awards under the Law Reform Act and the Fatal Accidents Act. In this regard, reliance was placed on the case of **Asal -vs- Muge and another [2001] KLR 202**, where it was held, inter alia that "the rights conferred by Section 2 (5) of the Law Reform Act (Cap 26) for the benefit of the estate of the deceased persons are in addition to and not in derogation of any right conferred on the dependants of the deceased persons by the Fatal Accidents Act. This does not mean that damages can be recovered twice over, but that if damages recovered under the Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act."

7. In interfering with the award of damages in the said case, the Court of Appeal noted that the award of damages for lost years under the Law Reform Act would go to the same persons who had been awarded damages for loss of dependency under the Fatal Accidents Act. The award made by the trial court was accordingly reduced by an amount equivalent to the award of damages for lost years. Also see the case of **Maina Kamaru and another -vs- Josephat Muriuki Wangondu – Civil Appeal No. 14 of 1989**. This court is thus urged to deduct the sum of Kshs 100,000/= being award for loss of expectation of life from the award under the Fatal Accidents Act.

8. The second issue discussed by the appellants in their submissions is that the assessment of damages for loss of dependency was erroneous because the trial court used a multiplier of 40 years to calculate the same. Counsel for the appellant contended that the trial court, in reaching its conclusions failed to consider the evidence on record as well as the exigencies and imponderables of life. Counsel also contended that the learned chief magistrate failed to consider that damages for loss of dependency are based on the expected period of support from the deceased to the dependants, who in this case were the deceased's parents. Reliance was placed on **Roger Dainty -vs- Munyi Omar Haji and another [2004] eKLR** in which the court held that a 10-year multiplier for a deceased who was aged 27 years was suitable. In reaching that decision the court took into account the normal vicissitudes of life of all persons. Appellants' counsel in this appeal also submitted that the trial court should have considered the deceased's parents' age in choosing the multiplier. Counsel proposed a multiplier of 10 years.

Respondents' Submissions

9. The respondents' submissions are dated 26th November, 2019 and filed in court on 28th November, 2019. This court is not sure whether it was inadvertence or sheer carelessness on the part of counsel when at paragraph 2 of the submissions the respondents say "The appellant now wishes to submit on the four grounds raised on the Memorandum of Appeal and the salient issues arising as follows:" I would like to give the respondents the benefit of the doubt and assume that the error was not intentional, since the body of the submissions show the submissions relate to the respondents' case.

10. The respondents also submitted that the appellants' failure to attach a certified copy of the decree appealed from renders the appeal null and void. The respondents' referred to Section 79 G of the Civil Procedure Act in arguing that availing the decree or order to the appellate court is a mandatory ritual without which an appeal cannot be said to be legitimate. The respondents further relied on Order 42 Rule 2 of the Civil Procedure Rules which provides:-

"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject the appeal summarily under Section 79 B of the Act until a copy is filed."

11. The respondents also relied on Order 42 Rule 13 (4) of the Civil Procedure Rules which sets out the documents that comprise a complete Record of Appeal, namely;

- a. *The Memorandum of Appeal;*
- b. *The pleadings;*
- c. *The notes of the trial magistrate made during the hearing;*
- d. *The transcript of any official shorthand typist notes, electronic recording or paratypists notes made at the hearing;*
- e. *All affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- f. *The judgment, order or decree appealed from, and, where appropriate the order, (if any) giving leave to appeal, provided that –*
 - i. *a translation into English shall be provided of any document not in that language;*
 - ii. *the judge may dispense with the production of any document or part of the document which is not relevant, other than those specified in paragraphs (a) (b) and (f).*

12. The respondents thus submitted that having failed to attach the decree which is one of the mandatory documents in the record of Appeal, then the appellant's appeal is fatally defective and must fail. Reliance was placed on **Ndegwa Kamau ^T/A Sideview Garage -vs- Frederick Isika Kalumbo [2016] eKLR**.

13. I have perused the Record of Appeal from cover to cover and I have established that the Record of Appeal consists of the following documents:-

1. Memorandum of Appeal	7/8/2017
2. Complaint and verifying affidavit	12/8/2017
3. Memorandum of Appearance	9/12/2008
4. Defence	18/9/2008
5. Agreed issued and Pre-trial Questionnaire	5/12/2013
6. Plaintiff's additional List of Documents	22/10/2012
7. Plaintiff's List of Documents	25/1/2012
8. Plaintiff's List of Witness Statements and List of Witnesses	6/3/2012
9 Reply to Defence	23/9/2012
10. Consent letter	5/9/2016
11. Defendants' submissions on Quantum	28/4/2017
12. Application for uncertified copies of the proceedings and certified copies of the judgment and decree	19/7/2017

14. I note from the above list that the judgment order or decree of the trial court do not form part of the Record of Appeal.

15. The above being the position, I propose to proceed with determining whether the omission by the appellant to attach the order or decree or judgment of the trial court as one of the documents of the Record of Appeal is fatal to the appeal. In my considered view the issue raised by the respondent is akin to a preliminary objection which must be determined before the court moves on to determine other issues.

Analysis and Determination

16. As seen from the respondents' submission the pivot of the submissions is Order 42 Rule 2 and also Order 42 Rule 13 (4) of the Civil Procedure Rules (supra). It is noted from the above provisions that whereas an intending appellant is at liberty to file his/her appeal without certified copy of decree or order appealed against, and to file such document later as ordered by the court, there is no room under Order 42 Rule 13 (4) to present a Record of Appeal without copies of judgment, decree or order appealed against. The requirement for these under Order 42 Rule 13 (4) is couched in mandatory terms and must therefore be complied so that without these documents, the Record of Appeal remains incomplete.

17. Ordinarily an appellant who has filed the Record of Appeal without all the requisite documents would apply to the court for leave to file a supplementary Record of Appeal in order to comply with the rules under Order 42 of the Civil Procedure Rules.

18. In the present case, the documents listed under Order 42 Rule 13 (4) (f) do not form part of the record. Clearly this is a fundamental breach of a rule that is couched in mandatory terms. In my considered view the breach is so grievous that it is not curable under Article 159 (2) (d) of the Constitution of Kenya 2010 or under the oxygen principle that is encapsulated under Sections 1A and 1B of the Civil Procedure Act. The appellants must therefore bear the full brunt of their omission.

19. There is nothing on record to show why the appellants did not file the certified copy of decree. All that is on record is the appellants' counsel's letter dated 19th July, 2017 addressed to the Executive Officer with a request to be supplied with a certified copy of the decree. There is no other letter to show that counsel took any follow-up action on their initial request for the documents.

20. For the above reasons, and as stated by Ngaa – J in **Ndegwa Kamau T/A Sideview George -vs- Frederick Isika Kalumbo** above that, according to Rule 13 (4) of Order 42 of the Civil Procedure Rules, "This court has the discretion to dispense with certain documents which may have been omitted from the record but certainly it cannot overlook an order or decree appealed from; these are what one may describe as primary and therefore, mandatory documents that must form part of the Record of Appeal." Also see **Kyuma -vs- Kyema [1988] KLR 185** in which the law as provided in Rule 13 (4) of Order 42 of the Civil Procedure Code was approved by the Court of Appeal.

Conclusion

21. For the reasons above given and having failed to comply with the rules, and in spite of there being one letter dated 19th July, 2017 requesting for the requisite documents, the appellants' Record of Appeal remains incomplete. The omission on the part of the appellants is fatal to the entire appeal. Accordingly, the appellant's appeal filed on 7th August, 2017 be and is hereby struck out with costs to the respondents.

22. It is so ordered.

Judgement written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 12th day of March, 2020

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CHRISTINE W. MEOLI

JUDGE

In the Presence of

Mr. Ndolo holding brief for Patel.....for Appellants

M/s.Mwangi.holding brief for M/s Kariuki.....for Respondents

Kevin/ Nancy.....Court Assistant