



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 1 OF 2019

ALBERT MUANGE MWANTHI &

DAMARIS KALONDU MUANGE Suing as an administrator of the Estate of

FAITH NDETE MUANGE - Deceased).....APPELLANTS

VERSUS

DOMNIC MUTHAMA MUANGE.....1ST RESPONDENT

ADEWA EMMANUEL.....2ND RESPONDENT

(Being an appeal from the judgment of the Court delivered on the 19th December 2018

by the Senior Principal Magistrate – Honourable C. Oluoch Senior Principal

in the Magistrate’s Court of Kenya at Mavoko Civil Suit No.396 Of 2016)

BETWEEN

ALBERT MUANGE MWANTHI &

DAMARIS KALONDU MUANGE Suing as an administrator of the Estate of

FAITH NDETE MUANGE - Deceased).....PLAINTIFFS

VERSUS

DOMNIC MUTHAMA MUANGE.....1ST DEFENDANT

ADEWA EMMANUEL.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated on 4th March, 2016, the appellants herein instituted a suit for damages arising from road traffic accident which occurred on 22nd December, 2013.

2. The suit was premised on a road traffic accident which occurred on 22nd December, 2013 along Mombasa Road at Mlolongo. It was pleaded that on that day the deceased, **Faith Ndete Muange**, was travelling as a lawful passenger aboard motor vehicle reg. no. KAN 178H whose actual, beneficial and possessory owner was the 1st Respondent. According to the Appellants who sued in their capacity as the father

and mother and administrators of the estate of the deceased, due to the negligence, carelessness and recklessness of the driver of the said vehicle, the same veered off the road and landed in a ditch thereby occasioning fatal injuries to the deceased. The particulars of the injuries, statutory particulars and particulars of special damages were pleaded.

3. The Appellants therefore claimed general damages under the **Fatal Accidents Act**, Cap 32 and the **Law Reform Act**, Cap 26; Special Damages in the sum of Kshs 30,700/=; Costs of the suit; and interests.

4. On 16th October, 2018, a consent order on liability was entered in which judgement was entered for the Appellants against the Respondents in the ratio of 75:25% and the parties agreed that the Appellants' testimony be taken on quantum.

5. PW1, **Damaris Kalondu Muange**, testified that on 22nd December, 2013, she received a call that the deceased, her daughter, had been involved in an accident. She then travelled to Athi River Shalom Hospital where she found that the deceased had succumbed to the injuries. After conducting a post mortem, the deceased was laid to rest. According to her, they reported the accident and were issued with a police abstract which she exhibited. She also obtained a death certificate which she exhibited. She obtained a grant of letters of administration ad litem which she produced as an exhibit.

6. According to the witness, the deceased had a child known as **Jesse Muange**, whom PW1 took in to stay with her and she produced the birth certificate. It was her evidence that the deceased was 35 years old at the time of her death and was an accountant at Jogoo Sacco earning Kshs 46,000/= per month and she exhibited her pay slip. She therefore sought for compensation.

7. In cross-examination, PW1 stated that she was 50 years old and was a business woman. Referred to the payslip, PW1 stated that the deceased's net pay was Kshs 14,104/= and was unmarried but was staying in her own house with her child Jesse. It was PW1's evidence that the deceased was providing for her. In re-examination, she reiterated that the deceased's gross pay was Kshs 45,000/=.

8. In her judgement, the learned trial magistrate awarded Kshs 20,000.00 for pain and suffering since in her view death was instantaneous. As for loss of expectation of life, she awarded Kshs 100,000.00. On loss of dependency, she noted that the deceased died at the age of 30 years and that the statutory retirement age was 60 years and therefore the deceased would have worked for around 30 years in her life if her life had not been cut short. She however took into account the vagaries and vicissitudes of life and found 20 years reasonable in respect of the multiplier. As regards the multiplicand, she adopted the deceased's net earnings which was Kshs 14,104/= and applied the dependency ratio of 2/3rds. Accordingly, she arrived at the sum of Kshs 2,256,640/= as loss of dependency. As for special damages, the learned trial magistrate found that the Appellants only managed to prove Kshs 30,500/- which she awarded. In her calculation the gross award was Kshs 2,407,140/- which she discounted by 25% to arrive at the net award of Kshs 1,805,355/=. She also awarded the costs and interests.

9. In this appeal, it was submitted that the learned magistrate did apply the wrong principles when she used the net earnings of the deceased during the month of August 2013 from the pay slip adduced as evidence by the Plaintiff and not the gross earnings, less statutory deductions while calculating the loss of dependency. According to the Appellants, in that month, the deceased was deducted the statutory deductions i.e. NSSF, NHIF and PAYE together with other deductions that were for her insurance, pension, savings, an advance and savings. It was contended that the honourable magistrate did compute all other heads correctly but failed to deduct only the statutory deductions when finding for the deceased net earnings. According to the Appellant, it is settled law that deceased net earnings is arrived at by deducting the statutory deductions from the gross salary when computing the loss of dependency. Accordingly, by using the amount paid off to the deceased on that particular month, the learned magistrate erred in the application of the law and principles in calculating the loss of dependency.

10. It was submitted that from the pay slip, it is clear that the deductions applicable was Kshs 7,606/=. This deducted from the gross income of Kshs. 46,000/= leaves the net pay to be Kshs. 38,394/=. In support of this proposition, the Appellants relied on the case of **Leonard O. Ekisa & Another vs. Major K. Birgen [2005] eKLR** and **James Gakinya Karieny & Another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) vs. Perminus Kariuki Githinji [2015] eKLR** and **Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another [2017] eKLR** and contended that the only amount being deducted is the tax.

11. It was thus do submit that the only amount to be deducted ought to be the statutory deductions as was found or held by the learned Judges hereinabove and consequently, in the instant matter appealed against, the learned magistrate ought to have found that the net income of the deceased was Kshs. 38,394/= by getting his gross income of Kshs, 46,000/= less the statutory deductions which is Kshs 7,606/=. Thus, her calculation ought to have been $38,394 \times 12 \times 20 \times 2/3 = 6,193,040/=$ less liability in favour of plaintiffs at 75%: 25% = 4,607,280/= which the Appellants pray that this court substitutes as the judgment of the lower court in the loss of dependency head and to order accordingly.

12. The Appellants also sought the costs of this appeal.

13. On behalf of the Respondent, it was submitted that the trial court did not err in adopting the actual monthly earning of the deceased as a multiplicand. It was submitted that the deceased made monthly contributions to a holiday savings scheme, a loan repayment, a providence fund and her Sacco contributions. All in all, the deceased lived on a sum of Kshs. 14,104/= per month as at the time of her passing on. It would not be correct for the Appellant to aver that the deceased relied on a sum of Kshs. 38,394/= per month. If indeed the dependants relied upon the deceased, then the only monies on which she could utilise to aid her dependents was Kshs. 14,104/= and no more.

14. It was therefore submitted that the only monies that could be adopted was the net pay, 'as it is the only amount that dependents benefited from during the deceased's lifetime. In support of their submissions the Respondents relied on **Charity Mapenzi & Another vs. National Water Conservation & Pipeline Corporation – Mombasa – HCCC No. 400 of 2002** and prayed that the appeal be dismissed with costs.

Determinations

15. In this appeal, the only issue that falls for determination is the multiplicand for the purposes of computing the earnings of the deceased.

Section 2 of the *Insurance Motor Vehicle Third Party Risks Amendment Act, 2013* provides that:

“earnings” means revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007 or the determination of the reasonable income, whichever is higher.

16. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989* where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

17. The same Judge in *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barnetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)*, in which **Ringera J.** as he then was, held at page 248 that:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

18. A similar position was arrived at by **Ntabgoba, PJ** in *Amina Musoni VS. Akamba (U) Ltd & Gaso Transport Services Ltd Kampala HCCS No. 656 of 1991* where the learned Principal Judge of Uganda held that:

“The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalised by multiplying a figure representing so many years’ purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and the children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow, and, and in certain cases, of the acceleration of the receipt by the widow of what the husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants.”

19. On its part, the Supreme Court of Uganda in *Sterling Civil Engineering (U) Ltd vs. Margaret Kirumira & Others SCCA No. 2 of 1991* expressed itself as hereunder:

“The failure by the Judge to assess the tax liability correctly is a matter of law. Until 1955, the position in most common law jurisdictions seems to have been that tax considerations should be ignored in matters of compensation. (See *Billingham vs. Hughes [1949] 1 KB 643*)...It was in 1956 that the House of Lords in England decided, quite rightly that to be consistent with the compensatory principle, an award of damages in a personal injuries action for loss of earning (past or future) must take into account the tax which the plaintiff, or as in this case the deceased, would or should have paid. (See *British Transport Commission vs. Gourley [1956] AC 185*)...The decision in that case was clearly on two conditions namely, (a) that the deceased would have paid tax on income earned, (b) there is no law requiring payment of tax on damages for personal injuries or loss of life. If these conditions obtained as they do in this country, then there must be deducted from the award to the plaintiff or if he is dead, to his dependants, for lost earnings, a sum representing the tax he would have paid on the income, which forms the basis of the award. This is good law because if the compensatory principle is to prevail it seems obvious that the plaintiff’s or his dependant’s remedy should be limited to compensation for the net earnings, that is for his gross earnings less tax since that is what he or they should have received if the tort had not been committed. The principle has since been applied to the Fatal Accidents Act of England. (See *Khemaney vs. Murlidhar [1959] EA 268*; *Hayes vs. Patel [1961] EA 129*; *Kampala Aerated Water Co. Ltd vs. Gulbanu Jajabali Kassam [1961] EA 291*)...The point made in these cases is that the award can be made from the net income. In this case the deceased was obliged to pay a specified income tax but which he deliberately withheld by not declaring it and it follows that that sum cannot form part of the award and should be excluded from the damages awarded. The omission cannot be an oversight, which did not substantially affect the amount of damages.”

20. I associate myself with the views of **GBM Kariuki, J** in *Mary Shesia Kivairu vs. Jeffa Enterprises Ltd & Another Kakamega HCCC No. 17 of 2004* that:

“In the instant case the plaintiff’s claim for loss of dependency is premised on the Fatal Accidents Act Cap. 32 and the claim for the benefit of the estate of the deceased is premised on the Law Reform Act, Cap 26. The assessment of damages for the death of a husband and father of small children should start with ascertainment of the age and expectation of working life of the deceased and the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion thereof which he would have made available for his dependants. In this way, the annual value of the dependency should be arrived at, and this must then be capitalised by multiplying the annual value by so many years purchase. The multiplier will bear a relation to the expectation of life and dependency of the widow and the children. The capital sum so reached should then be discounted to allow for the prospect of the widow’s remarriage, and in certain cases, of the acceleration of the receipt by the dependants of what the deceased left to them respectively; the resulting sum (which will depend on a number of estimates and imponderables) will be the lump sum to be apportioned among dependants...Where the deceased was guilty of contributory negligence and liability is apportioned, the payment to which the plaintiff is entitled must suffer diminution of the portion attributable to the deceased...There is no reason why the support necessary for young children should, where the mother has been killed in an accident, be more sparingly estimated than if the mother had lived. This principle should apply with equal force in the case of a father...It is accepted principle in cases of this nature that what must eventually be ascertained is the pecuniary loss of each individual entitled to sue.”

21. In my view, in calculating the loss of dependency the court must as much as possible ascertain the actual loss occasioned to the dependants of the deceased. In so doing, it is my view that the deceased’s net income must be ascertained. While the net earnings as indicated in the payslip is the best guide, it is not necessarily the basis upon which the multiplicand is to be determined. This must be so because, there may be deductions which the deceased facilitated for the benefit of her dependants and which as a result of the deceased’s death the dependants have lost. That loss must be taken into account in calculating the loss of dependency even though the pay slip does not indicate the same as net earnings.

22. In this case the sum of Kshs 15,000.00 being deduction for Holiday Saving must have been for the benefit of herself and her child since she was unmarried. However, it would be unreasonable to consider the whole sum as having been for the benefit of her child. In my view a sum of Kshs 5,000/= is reasonable estimation of the sum she could have saved for her child.

23. In the premises, I would set aside the award for loss of dependency and substitute therefor the following:

$$19,104 \times 12 \times 20 \times \frac{2}{3} = 3,056,640/= \text{ less liability in favour of plaintiffs at } 75\%: 25\% = 2,292,480/=$$

24. The appeal therefore succeeds to that extent.

25. The appellant will have the costs of this appeal.

26. It is so ordered.

Read, signed and delivered in open Court at Machakos this 28th day of April, 2020

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Josephine