



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 31 OF 2019

(An appeal arising from the judgment and decree of the Hon. SO Ongeru, Principal Magistrate (PM), in Vihiga PMCCC No. 119 of 2017 of 26th February 2019)

ELISIBA WANJIKU NJUGUNA.....APPELLANT

VERSUS

IRENE NEKESA KUNDU AND PAUL MBOGO (suing as the administrators and personal representatives of the estate of JAPHETH MBOGO (Deceased)).....RESPONDENTS

JUDGMENT

1.The suit at the trial court was initiated by the respondents herein against the appellant, for general and special damages arising from a motor traffic accident involving a motor vehicle owned and controlled by the appellant and a motorcycle the deceased was riding, leading to his demise. The appellant entered appearance and filed a defence, in which he denied liability and attributed negligence on the deceased.

2.The trial court heard two witnesses from the respondents side, who testified as PW2 and PW3, and none from the appellant's side. The respondents stated that the vehicle belonging to the appellant veered from its lane into that of the deceased and collided with the motorcycle he was riding, as a result of which he suffered fatal injuries. The deceased was said to have been 32 years of age at the time, to have been in salaried employment and in business, and to have been married with children. Consent was recorded at 90:10 against the appellant on liability.

3. The trial court awarded damages as follows: loss of dependency at Kshs. 11, 643, 320.00 (73, 527x2/3x20x12), loss of expectation of life Kshs. 100, 000.00, loss of consortium Kshs. 100, 000.00, pain and suffering Kshs. 10, 000.00 and specials at Kshs. 163, 720.00, making a total of Kshs. 12, 017, 040.00. After taking liability into account, the amount came down to Kshs. 10, 815, 336.00, but since the respondents had acceded to Kshs. 9, 790, 922.00, that was the figure that the court finally awarded as the judgement sum, plus costs and interests.

4. The appellant was aggrieved by the decision and lodged this appeal. He has raised several grounds: that the damages awarded were excessive, that the multiplier adopted was excessive and unjustified, that the award of Kshs. 11, 643, 320.00 for loss of dependency was excessive and was unsupported by evidence, that the appellant's written submissions were not considered, and that the judgement entered of Kshs. 9, 790, 922.00 was unjustified.

5.Directions were given on 22nd January 2020, for disposal of the appeal by way of written submissions. Both sides have filed their respective written submissions.

6.It is submitted, for the appellant, that the figure of Kshs. 73, 527.00 monthly earnings should not have been used, as there was no evidence that the deceased was still in employment. It is argued that the trial court ought to have used the minimum wage of Kshs. 10, 954.00. It is also submitted that the dependants of the deceased were not proved. The appellant cites Maina Kaniaru vs. Josephat Muriuki Nairobi CACA No. 14 of 1989, for the proposition that where damages are recovered under the Law Reform Act, Cap 26, Laws of Kenya, the same ought to be taken into account in deductions recoverable under the Fatal Accidents Act, Cap 32, Laws of Kenya. On special damages, it is pleaded that the same must be specifically pleaded and proved, and any receipts produced should be subjected to section 19 of the Stamp Duty Act, Cap 480, Laws of Kenya.

7.The respondents submit that the multiplier of 20 adopted by the court was justified as the court had discretion, the multiplicand of Kshs. 73, 527.00 was also justified as it was based on the deceased's bank statements, and the court should not have entered judgement for Kshs. 9, 790, 922.00 as there was no supporting evidence.

8.Being the first appellate court, I am alive to the principles stated in Ngigi Kuria & another vs. Thomas Ondili Oduol & another [2019] eKLR and Julius Vana Muthangya vs. Katuuni Mbila Nzai [2019] eKLR, with regard to the duty of the court, to review the evidence afresh and with an open mind. See also Selle & Another vs. Associated Motor Boat Co. Ltd & Another [1968] EA 123.

9.On quantum, the appellant has issues with the award on loss of dependency and special damages. On loss of dependency, the appellant argues that the multiplicand adopted was wrong. The trial court picked on the figure of Kshs. 73, 527.00 as the monthly income of the deceased. The complaint is that the money was in a bank statement, and there was no evidence that the deceased was in employment as at the date of his death on 7th March 2017. I agree with the appellant. There is no evidence that the appellant was in employment up to the date of his death. The evidence placed on record of employment is Exhibit 1, which extended the contract of employment up to 30th September 2013. The figure of Kshs. 73, 527.00 was picked from a bank statement. There is no evidence that the money reflected in that bank statement came from employment, and it is not even clear where the money came from, and what it was for. The last payment was in December 2016. No payments were made in January and February 2017. It cannot, therefore, be said that the deceased was in employment as at 7th March 2017 when he died. Pay slips for February and March 2017, would have sufficed as evidence that he was still in employment. Employment cannot possibly be proved by way of a bank statements. In any event, PW2 testified that the deceased had left employment as at the date of his death. Without proof of income from employment, the court ought to have worked the amount of loss of dependency on the basis of the minimum wage of Kshs. 10, 954.00 for 2017. The appellant does not appear to have a quarrel with the rest of the figures. So loss of dependency ought to have worked out as follows: 10, 954x2/3x12x20=1, 752, 640.00.

10. The other aspect that the appellant submits on relates to the lack of proof of the dependants. The appellant argues that there was no proof. PW2 testified that the deceased had a wife and four children. He was cross-examined, but the appellant did not raise any questions on the dependency. I do not think anything should turn on this as a consequence.

11. With regard to the award of damages under the Law Reform Act, being deducted from the award under the Fatal Accidents Act, it was stated in *Hellen Waruguru Waweru vs. Kiarie Stores Limited* [2015] eKLR, that there was no legal requirement for such deduction, and, therefore, the trial court did not err in failing to make the deduction.

12. On special damages, it is trite that special damages must not only be specifically pleaded, they must also be specifically proved. However, in *Premier Diary Limited vs. Amarjit Singh Sagoo & another* [2013] eKLR, *Capital Fish Kenya Limited vs. Kenya Power & Lighting Company Limited* [2016] eKLR and *JNK vs. Chairman Board of Governors [...] Boys High School* [2018] eKLR, the courts made a special case for burial expenses on grounds that receipts may not always be available to support funeral expenses. In the instant case, the receipts were put in evidence, without any objection from the appellant. Consequently, the trial court cannot be said to have fallen into any error. An argument was raised about stamp duty; I note that all the receipts put in evidence bear revenue stamps.

13. In the end, I do find that the appeal succeeds. The final award is revised as follows: loss of dependency at 10,  $954 \times 2/3 \times 12 \times 20 = 1,752,640.00$ , loss of expectation of life Kshs. 100,000.00, loss of consortium Kshs. 100,000.00, pain and suffering Kshs. 10,000.00 and specials at Kshs. 163,720.00, making a total of 2,126,360.00. After factoring the 10% liability, the amount comes down to Kshs. 1,913,724.00

14. The appeal herein is disposed of in the terms stated above. Each party shall bear their own costs of the appeal.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020**

**W.**

**MUSYOKA**

**JUDGE**