



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 11 OF 2014

GEOFFREY M. NDEGWA.....APPELLANT

VERSUS

FRANCIS NJERU MUIRURI

(Suing as the legal representative of the estate of

ALEX MUGO MUIRURI (deceased).....RESPONDENT

(Being an Appeal from the Judgment of the Honourable P.N. Gesora, Senior Principal Magistrate delivered on the 24.1.2014 at Machakos in CMCC 533 OF 2012)

BETWEEN

FRANCIS NJERU MUIRURI

(Suing as the legal representative of the estate of

ALEX MUGO MUIRURI (deceased).....PLAINTIFF

VERSUS

GEOFFREY M NDEGWA.....DEFENDANT

JUDGEMENT

1. Vide pleadings filed in the trial court on 4.7.2012, the respondent sued as the legal representative of the Estate of the deceased who was said to have died from a road traffic accident that occurred on the 28th August, 2011 where the deceased had been a pedestrian along Athi River- Kitengela Road and who was hit by motor vehicle KBK 755M. The respondent pleaded negligence and further that the deceased's estate suffered special damages of Kshs 46,800. It was pleaded that at the time of the death of the deceased, he was then a 33-year-old mechanic who used to earn Kshs 1,500; that he was a man with a promising future and had one dependant, namely his mother. The respondent sought for damages under the Law Reform Act and the Fatal Accidents Act. The respondent also sought costs of the suit plus interest.

2. In his defence, the appellant denied negligence; denied loss and damages and pleaded that the accident was wholly caused and or contributed to by the negligence of the respondent.

3. The matter proceeded for hearing where **Pc James Muiano** testified as **Pw1**. He testified that he visited the accident scene on 28.8.2011 and that he saw the body of the deceased lying on the road. He tendered the sketch map of the accident scene.

4. **Pw2** was the respondent and who testified that the deceased was his brother who was unmarried and that he received information that the deceased had been killed in a road accident. He tendered receipts as evidence of expenses incurred in burying the deceased as well as the police abstract in respect of the accident. He told the court that the deceased was a trained mechanic who used to earn Kshs 1,500/- to 2000/- per day and on re-examination, he stated that the amount claimed was the monthly income.

5. **Pw3** was **Josephine W Muiruri**, the deceased's mother who testified that the deceased used to send her money for necessities.

6. Pw4 was **Dr. Fredrick Okinyi**, a pathologist who tendered the post mortem report in respect of the deceased that was done on 7.9.2011, about a week after the accident.

7. The appellant's case was closed and DW1 was the appellant who testified that on the material day he was driving the subject vehicle when the deceased entered the road abruptly and in the process he was hit. He testified that he blamed the deceased for walking in the middle of the road. That was the close of the appellant's case.

8. Vide undated judgement delivered by the trial court on the **24th January, 2014**, the court found the appellant 65% liable for the accident. The learned magistrate awarded the respondent total damages of **Kshs.1, 697,800.00** being **Kshs. 20,000.00** for pain and suffering, **Kshs. 120,000.00** for loss of expectation of life and a sum of **Kshs. 2,400,000.00** for loss of dependency (after using a dependency ratio of 2/3, a multiplier of 15 and an earning capacity of Kshs 20,0000/) and **Kshs. 46,800.00** for special damages. The Appellant was dissatisfied with the award on quantum and as such preferred this Appeal vide a Memorandum of Appeal dated 14.2.2014 and filed in Court on 18.2.2014.

9. It was counsel's position that the quantum under the Fatal Accidents Act i.e. dependency was too high, erroneous and hence he sought that the award on general damages under the Fatal Accidents Act that was given by the trial court as well as the award for lost years be reduced. The reason for the objection was because the minimum wage/ multiplicand ought to have been Kshs 8,598/- per month as per the Regulations of Wages Order 2011. Counsel took issue with the dependency ratio of 2/3 as the deceased was unmarried.

10. Learned counsel took no issue with the **KShs. 20,000.00** awarded for pain and suffering. However, it was argued that the award made under the Fatal Accidents Act be set aside and substituted with an award of Kshs 393,920 using the minimum wage of Kshs 8,598/- as at the time of death multiplied by 10 years being the difference to retirement and 1/3 dependency ratio.

11. The respondent's submissions were filed on 15.7.2020. Learned counsel supported the trial court's decision but added that this court could as well increase the award of damages on the various heads of damages namely pain and suffering, loss of expectation of life and loss on dependency to a sum of Kshs 40,000/, 600,000/ and 4,320,000/ respectively. He based reliance on the fact that the deceased was then aged 33 years and solely depended upon by his elderly mother and thus a dependency ratio of 2/3 was appropriate. It was also submitted that he used to earn a living as a trained mechanic earning a sum of Kshs 1500/ per day and was expected to retire after about 27 years.

12. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that in order to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

13. Having considered the rival pleadings in the trial court, the evidence therein, the memorandum of appeal and the respective submissions of counsels, the issue for determination is whether there has been a case made for disturbing the award of the trial court.

14. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In **Phillips vs The London South Western Point Way Company (1879 -80) 5. Q.B.D. 78**, James L. J. said on page 85:

"The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and if necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury."

15. The appellant's gravamen is that the award was too high, that the trial court used an erroneous dependency ratio and earnings. It is undisputed that the deceased died as a result of the accident and that he was aged 33 years when he met his unfortunate death. Did the court consider the wrong principles in the award of damages and did the court apply the wrong principles of damages under the Fatal Accidents Act?

16. The damages for death as a cause of action are pain and suffering, loss of expectation of life and loss of dependency. It is trite principle of law that in determining the amount to award in cases of loss or injury as a result of negligence of another, the fundamental principle of law to be followed was enunciated by Lord Blackburn in **Livingstone v Rawyards Coal Co. (1880) 5 App. Cas . 25 at 39**. As being " that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation."

17. However, it should be noted that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant at the same time without well-defined reference parameters unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in **Wright v British Railway Board (1938) AC.1173, 1177**, stated that; ... "Non-economic loss...is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases." Be that as it may, this is a clarion call to the rules committee to set guidelines on conventional awards to be awarded by Kenyan courts just like the House of Lords has been setting guidelines on the conventional sums to be awarded by courts in England and Wales, (**See Cramwell v Wilson [1982] A.C. 27**).

18. In light of the lack of guidelines, this court will not lose sight of the fact that even though money can compensate to an extent, it cannot create an experience to be the same as it were before the event giving rise to the action. Lord Morris in **West v Sheppard [1964] AC 326**

stated;

"All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation."

Of course it is common knowledge that no specific amount of money can restore or bring back broken bones and flesh and thus what a court awards is only a sum to act as consolation over the misfortune caused by a defendant to the victim.

19. Inflation is also a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim.

20. In taking the multiplier approach, courts have considered how much the deceased would have earned upon completion of education, how many years he/she would have supported the parents and the siblings and for how many years. The damages awarded would be by multiplicand and the result reduced by 1/3 because as at the deceased's death he was not married and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months. To this extent I find that the trial court erred in applying a dependency ratio of 2/3.

21. The deceased was aged 33 when he met his death and the life expectancy as per statistics given by the World Bank is 66.7 years. The multiplicand would be the expected monthly earnings of an ungraded artisan. **In Fredrick Ochieng Odero v Nakuru Teachers Training College [2018] eKLR**, the court observed that "*Ungraded artisan is defined as one who carries out simple repairs and maintenance work with a reasonable proficiency in a particular trade or trades although not in possession of any Trade Test Certificate*". I shall take the retirement age of 60 years as the ceiling and taking into account vagaries of life, I adopt the age of 55 years meaning that the working life of the deceased would be 22 years on average. I will therefore take the same as the multiplier. In the ungraded artisan field, the average earnings of the deceased as per the minimum wage in 2011 as at the time of death was Kshs 10,239/ in Nairobi (See **THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2011**). The calculation for loss of dependency is thus; $22 \times 1/3 \times 10,239 \times 12 =$ **Kshs 901,032/-**. The said award would be commensurate in the instant case. It is noted that the appellant has no problem with the damages in the other heads namely pain and suffering, loss of expectation of life and special damages and hence the same shall remain undisturbed. The respondent's counsel's suggestion that the other heads of damages be interfered with is not convincing as the learned trial magistrate's assessment was quite reasonable and ought not to be disturbed. In any event, the respondent did not lodge a cross appeal. My overall assessment is that the trial court did not err in the other heads of damage except that on loss on dependency.

22. The upshot is that the appeal is partially successful to the extent that the award by the trial court on loss of dependency is set aside and substituted with an award of **Kshs 901,032/** subject to contribution of 35%. The rest of the amounts awarded remain undisturbed. The Appellant is awarded half costs of the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 30th day of July, 2020.

D. K. Kemei

Judge