



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 45 OF 2016

DAVID KIPRONO.....1<sup>ST</sup> APPELLANT

KINYUA WIRE.....2<sup>ND</sup> APPELLANT

JOHN FUNDI IRERI.....3<sup>RD</sup> APPELLANT

VERSUS

MARY WAMBETI MUGIRA

*[suing as legal representative of the estate of James Mbogo Njagi [deceased]]*.....RESPONDENT

**JUDGMENT**

1. This appeal arises from a judgment of the trial court *Hon. Mr. M.N. Gicheru* (CM) in which the respondent was awarded special and general damages in the total sum of KShs.972,360 together with costs of the suit and interest.
2. The judgement arose from a suit instituted by the respondent against the three appellants in her capacity as the legal representative of the estate of her late son, the late *James Mbogo Njagi* who lost his life after being knocked down by motor vehicle registration number KBJ 214A Toyota *matatu* which was allegedly being driven negligently by the 3<sup>rd</sup> appellant as the authorized driver or agent of the 1<sup>st</sup> and 2<sup>nd</sup> appellants who owned the vehicle.
3. The trial court's record shows that on 11<sup>th</sup> April 2016, the parties recorded a consent on liability in the ratio of 80:20 in favour of the respondent against the appellants. Hearing thereafter proceeded for assessment of damages leading to the impugned judgment. The amount challenged on appeal was the final award after taking into account the deceased's agreed contribution to liability.
4. In the memorandum of appeal filed on 17<sup>th</sup> August 2016, the appellants principally challenged the award for loss of dependency under the *Fatal Accidents Act* on grounds that the trial court erred in law and in fact in adopting an income of KShs.9,000 while the evidence adduced at the trial disclosed the deceased's income as KShs.5,500. The appellants also complained that the learned trial magistrate erred in failing to deduct the award made under the *Law Reform Act* from the award made under the *Fatal Accidents Act* since the beneficiaries of the awards under both Acts were the same.
5. By consent of the parties, the appeal was prosecuted by way of written submissions which counsel on record for the parties duly filed.
6. I have considered the grounds of appeal, the rival written submissions filed by the parties and the authorities cited. I have also read the trial court's record including the judgment rendered by the learned trial magistrate.
7. This is a first appeal to the High Court on the issue of quantum. At the outset, I wish to point out that as a general rule, the award of damages is at the discretion of the trial court. However, like any other judicial discretion, that discretion must be exercised judiciously in accordance with established legal principles taking into account the facts of each case.
8. Since the award of damages is at the discretion of the trial court, as a general rule, an appellate court ought to be slow to interfere with an award of damages unless certain circumstances are shown to exist. As held by the Court of Appeal in *Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2 [1987] KLR 30*, an appellate court should only disturb a trial court's award of damages if it is satisfied that in arriving at the award, the trial court took into account irrelevant factors or failed to consider relevant ones; that the award was not based on any evidence or that it was either too low or too high as to lead to an inference that it was based on an erroneous estimate of the damage suffered. See also: *Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1*.

9. Since the awards made under the *Law Reform Act* are not contested, I will only consider the award made for loss of dependency since this is what is challenged in this appeal.

10. The applicant has taken issue with the multiplicand used by the trial court to calculate loss of dependency. According to the pleadings in the plaint, at the time of his demise, the deceased was 38 years old. He was working as a security guard earning a basic salary of KShs.6,500. He had two dependants, namely a son and his mother, the respondent. The record shows that no evidence was adduced by the parties in this case. Parties chose to have the issue of quantum determined on the basis of their written submissions.

11. In his judgment when assessing damages for loss of dependency, the learned trial magistrate stated as follows at page 37 of the record:

***“I must add that these submissions are a mere guide and the court is not bound by them. For instance, it is highly unlikely that the deceased would have continued earning a paltry KShs.5,500 a month which is way below the minimum wage in this country. It is also unlikely that the son would have depended on the deceased for much longer than probably another ten (10) years. The age of the deceased’s mother who is the plaintiff is not given. It should have been given to enable the court determine the period of her dependency on the deceased. Given the above, I find that the multiplier should be 15 years, the multiplicand KShs.9,000 and the ratio of dependence 1/3.*”**

***KShs.9,000 x 12 x  $2\frac{2}{3}$  x 15=1,080,000”***

12. Given the foregoing, I am in agreement with the appellants that the trial court’s adoption of KShs.9,000 as the multiplicand was based on mere speculation and it is not clear how the trial court settled on that amount. As stated earlier, the parties did not adduce evidence in this matter. This means that the amount was not based on any evidence and it was also not based on any pleading. The amount pleaded as the deceased’s income prior to his death was KShs.6,500 and not KShs.5,500 as submitted by the parties and erroneously accepted by the learned trial magistrate.

13. Granted, the amount pleaded was little and may have amounted to exploitation of the deceased by his former employers as submitted by the respondent but parties are bound by their pleadings and they cannot choose to depart from them to change the nature of their case in the course of a trial more so at the submissions stage. It is thus my finding that the learned trial magistrate erred in adopting a multiplicand of KShs.9,000 which was neither pleaded nor proved by the respondent. He ought to have used the income pleaded in the plaint which was KShs.6,500. The multiplicand of KShs.9,000 is thus set aside and is substituted with an amount of KShs.6,500.

14. The appellants also challenged the multiplier of 15 years used by the learned trial magistrate and submitted that a multiplier of 10 years was more suitable given the age of the deceased and his dependent son who was allegedly 16 years old at the time of his death.

15. Though the learned trial magistrate apparently relied on a copy of a birth certificate which was in the court record showing that the deceased’s son was born on 26<sup>th</sup> February 1998 making him 18 years at the date of the trial court’s judgment and about 14 years at the time of the deceased’s demise, the birth certificate was not produced as an exhibit in the trial and did not amount to evidence which would have formed the basis of any finding by the trial court. See: ***Kenneth Nyaga Mwigye V Austin Kiguta & 2 Others, [2015] eKLR.***

16. The respondent did not plead her age or that of the deceased son at the time the deceased died. Considering that the deceased lost his life at the prime age of 38 years and he probably would have worked and supported his family till he retired which could have been at an age beyond 60 years since he was not subject to the mandatory retirement of 60 years which is specific to public servants, but given the vagaries and vicissitudes of life, I find the multiplier of 15 years adopted by the trial court reasonable and the same is hereby upheld. Consequently, damages for loss of dependency will work out as follows:

$KShs.6,500 \times 12 \times 15 \times \frac{2}{3} = 780,000$

17. The other ground raised by the appellants in the appeal which was reiterated in their submissions is that the learned trial magistrate erred in failing to deduct KShs.100,000 award made for loss of expectation of life under the *Law Reform Act* from the award for loss of dependency as is the norm in fatal accident claims.

18. In support of their submissions on this point, the appellants relied on the persuasive authority of ***Transpares Kenya Limited & Another V SMM Suing as the Legal Representative for and on Behalf of the Estate of EMM [Deceased], [2015] eKLR.***

19. In response to this ground of appeal and the appellants’ submissions in support thereof, I will do no more than to reproduce Section 2 (5) of the *Law Reform Act* (the Act) which provides as follows:

***“(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom .....”***

20. It is clear from the above provision that rights conferred for the benefit of a deceased person’s estate under the Act are in addition to and not in derogation of any rights conferred on dependants of a deceased person under the *Fatal Accidents Act*. [Emphasis added].

21. In my view, beneficiaries of an estate who also happen to be dependants of a deceased person can seek and obtain damages under both the Act and *Fatal Accidents Act* in respect of the same death.

22. Section 4 (2) of the *Fatal Accidents Act* sets out what should not be taken into account when assessing damages for loss of dependency.

It does not state that any award made for the benefit of an estate of a deceased person should be deducted from an award made under the Act.

23. As was held by the Court of Appeal in *Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2 [supra]*, when interpreting *Section 4 (2)* of the *Fatal Accidents Act*, the trial court is not required to make a mathematical deduction of the amount awarded for lost years from an award made for loss of dependency. All the trial court is required to do is to take into account the award when assessing damages for loss of dependency.

24. In this case, the amount awarded to the deceased's estate as damages for lost years was the standard conventional sum of KShs.100,000 in respect of loss of life of a man who died prematurely at the prime of his life aged only 38 years. It is apparent that the learned trial magistrate awarded a conservative amount for loss of expectation of life having in mind that the administrator of the deceased's estate was his mother who was to benefit from additional damages for loss of dependency.

25. In this case, I am persuaded to find that the learned trial magistrate had in mind the requirements of *section 2 (5)* of the *Law Reform Act* and *section 4 (2)* of the *Fatal Accidents Act* when awarding damages under the two statutes. The law did not obligate him to make a deduction of the award for lost years from the award for loss of dependency. The appellant's submissions that the learned trial magistrate erred in failing to make the aforesaid deduction in my view is not well founded and cannot be sustained.

26. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. The award made by the trial court for loss of dependency is hereby set aside and is substituted with an award of KShs.780,000. Adding this to the awards made under the *Law Reform Act* and as special damages, judgment is hereby entered for the respondent against the appellants jointly and severally for the total sum of KShs.915,450 which shall be subjected to the deceased's contribution of 20%.

27. On costs, the order that best commends itself to me is that each party shall bear his or her own costs of appeal but the respondent is awarded costs of the suit in the lower court.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of November 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

No appearance for the appellants

No appearance for the respondent

Ms Mwinzi: Court Assistant