



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 74 OF 2017

DAVID NJERU GICHOYAAPPELLANT

VERSUS

**JEREMIAH NJUE NAMU [suing as legal representative of the
estate of Tiberio Maringa Namu [deceased].... RESPONDENT**

JUDGMENT

1. This appeal arises from the judgment of *Hon. M.N. Gicheru (CM)* dated 27th November 2017 in a suit which was instituted by the respondent against the appellant in his capacity as the legal representative of the estate of *Tiberio Maringa Namu*. In the suit, the respondent prayed for both special and general damages under the *Law Reform Act* and the *Fatal Accidents Act* together with attendant costs and interest.

2. According to the plaint dated 31st October 2016, the cause of action arose from a fatal accident that occurred on 19th October 2015 along the Embu-Kiritiri Road involving motor vehicle registration number KBU 107F (subject vehicle) owned by the appellant in which the deceased was a passenger. The respondent averred that the accident was caused by the negligence of the appellant in the manner in which he drove, managed and or controlled the subject motor vehicle. The particulars of the appellant's alleged negligence were pleaded at paragraph 5 of the plaint.

3. In his defence filed on 6th March 2017, the appellant admitted occurrence of the fatal accident but denied any liability for its occurrence and put the respondent to strict proof thereof.

4. The proceedings of the trial court shows that the parties agreed that the trial court determines the suit on the basis of the evidence they had filed and their written submissions. The record however shows that though the plaintiff filed three witness statements and several documents, the appellant did not file any witness statement in support of his defence.

5. After considering the evidence placed before the court as well as the parties' written submissions, the learned trial magistrate entered judgment on liability in favour of the respondent against the appellant at 100%. He also awarded the respondent general damages under both the *Law Reform Act* and the *Fatal Accidents Act* as follows:

- i. Pain and suffering - KShs. 20,000
- ii. Loss of expectation of life - KShs.100,000
- iii. Loss of dependency - KShs.728,000

The respondent was also awarded costs of the suit and interest.

6. The appellant was aggrieved by the trial court's decision on quantum. He proffered this appeal relying on four grounds in which he basically contested the multiplicand of KShs.14,000 the learned trial magistrate adopted in calculating damages for loss of dependency. He also complained that the trial court erred in law by not deducting the award for loss of expectation of life from that of loss of dependency in computing the final award.

7. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 15th September 2020 while those of the respondent were filed on 9th October 2020.

8. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. The duty of a first appellate court is enunciated in a plethora of authorities from both the High Court and the Court of Appeal and is now well settled. It entails revisiting the evidence tendered before the trial court and subjecting it to an exhaustive independent analysis to enable the court arrive at its own independent conclusions regarding the soundness or otherwise of the trial court's decision. See: *Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1*; *Selle & Another V Associated Motor Boat Company Limited, [1968] EA 123*, among others.

9. As noted earlier, this is an appeal against the trial court's decision on quantum. It is therefore apposite to remind ourselves of the principles that guide an appellate court in deciding whether or not to interfere with a trial court's decision on quantum. As a general rule, the award of damages rests with the discretion of the trial court but that discretion must be exercised in accordance with the law and established legal principles.

10. It is trite that an appellate court should be slow to interfere with the trial court's discretion unless it is satisfied that in arriving at the award, the trial court misapplied the law or misapprehended the evidence. The court will also interfere with the award if it is apparent that the trial court took into account irrelevant factors or failed to consider relevant ones or that the award was either inordinately low or high as to represent an erroneous estimate of the damage suffered. The court should refrain from substituting a figure of its own for that awarded by the lower court just because it would have awarded a different figure if it had tried the case in the first place. See: *Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1*; *Ali V Nyambu T/A Sisera Store, [1990] KLR 534*; *Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30*.

11. Guided by the above principles, I will now turn to address the grounds advanced by the appellant in this appeal.

As noted earlier, one of the appellant's grievances relates to the multiplicand used by the learned trial magistrate in calculating damages for loss of dependency. In his submissions, the appellant implored me to find that the trial court erred in using KShs.14,000 as the multiplicand yet there was no evidence to prove the deceased's earnings prior to his death apart from the respondent's statement that he used to be a businessman; that in the absence of proof of income, the trial court ought to have applied a multiplicand of KShs.5,436.90 being the minimum wage for an unskilled worker as provided for in the *Regulation of Wages (Agricultural Industry (Amendment) Order, 2015*.

12. On his part, the respondent supported the trial court's adoption of KShs.14,000 as the multiplicand arguing that it was reasonable given that the deceased was involved in income generating activities as pleaded in the plaint.

13. I have perused the two witness statements filed by the respondent which comprised the respondent's evidence in support of his case in view of the consent recorded by the parties on 19th June 2017. The respondent in his witness statement claimed that the deceased was a farmer cum businessman as he was involved in the *miraa* trade. In my view, this evidence supported the assertion in the plaint that prior to his death, the deceased was a *miraa* farmer. Though in the plaint it was alleged that he used to earn a monthly income of KShs.60,000, no evidence documentary or otherwise was adduced by the respondent to prove this claim or to prove the deceased's actual income prior to his demise.

14. The appellant is therefore correct in his submissions that the respondent did not tender any evidence to prove the deceased's income but I am unable to agree with his submission that in the absence of proof of income, the court should have adopted the minimum wage for an unskilled agricultural worker in the sum of KShs.5,436.90 as the multiplicand in this case.

15. The minimum wage proposed by the appellant would not have been applicable in this case given the respondent's pleading and evidence that the deceased was a farmer prior to his death which claim was not disputed or controverted by any evidence to the contrary since the appellant chose not to tender any evidence in support of his defence.

16. Given the foregoing and in view of the fact that there was no evidence presented before the trial court to prove the deceased's income prior to his death, it is my finding that the multiplier approach used by the learned trial magistrate to assess damages for loss of dependency was not appropriate in this case. The trial court should have appreciated this fact and used the lump sum principle or the global approach which was more appropriate.

17. In making the above finding, I am persuaded by the holding of *Koome, J* (as she then was) when she stated in *Albert Odawa V Gichimu Githenji, (2007) eKLR* while quoting *Ringera, J* in *Mwanzia V Ngalali Mutua V Kenya Bus Services (Msa) Limited & Another* that:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

18. I also associate myself with the opinion of *Ngaah, J* in *Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR* when he stated thus:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

19. In this case, it is not disputed that the deceased was 24 years old at the time of his untimely death. It is disclosed in the pleadings that he

was survived by his mother then aged 67 years and three adult brothers who included the respondent. I agree with the learned trial magistrate that only his mother qualified to be awarded damages for loss of dependency since it is common knowledge that parents in their old age more often than not rely on their children for their upkeep and subsistence. The deceased's brothers were all adults and ordinarily, they were expected to fend for themselves. No evidence was adduced in this case to demonstrate that any of them was dependent on the deceased.

20. Taking into account the deceased's age at the time of his demise, his mother's age and the period of her expected dependency and taking into account all other relevant factors, it is my finding that a sum of KShs.700,000 would have been sufficient to compensate the deceased's mother for her loss of dependency. The sum of KShs.848,000 awarded by the trial court is consequently set aside and is substituted with a sum of KShs.700,000.

21. The other ground advanced by the appellant in this appeal is that the learned trial magistrate erred by not deducting the sum of KShs.100,000 awarded for loss of expectation of life from the award for loss of dependency. Reliance was placed on the case of *Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [supra]* and *Mary Njeri Murigi V Peter Macharia & Another, [2016] eKLR* where it was held that assessment of damages under the *Law Reform Act* must take into account damages awarded under the *Fatal Accidents Act* to avoid over compensating the deceased's dependents.

22. At the outset, it is pertinent to note that damages under the *Law Reform Act* are awarded for the benefit of the estate of a deceased person while those under the *Fatal Accidents Act* are awarded to the deceased's dependents to compensate them for loss of their dependency. The damages awarded under the two legal regimes are therefore meant for different purposes but since in reality it happens that administrators of the deceased's estate are also the deceased's dependents, the courts have over time developed a practice of awarding only conventional sums under the *Law Reform Act* to avoid the possibility of over compensating the same people for the loss of their loved one.

23. That said, the law is clear that administrators of estates can seek and obtain damages under both the *Law Reform Act* and the *Fatal Accidents Act*. Section 2 (5) of the *Law Reform Act* specifically provides that the right conferred by or for the benefit of the estate of a deceased person shall be *in addition to* and *not in derogation* of the rights conferred on the dependents of a deceased person under the *Fatal Accidents Act*. This is why the Court of Appeal in *Kemfro Africa Limited T/A Meru Express Services* case (Supra) emphasized that in cases where administrators of an estate are also dependents of the deceased, courts should consider awarding conservative amounts for loss of expectation of life to avoid double compensation for the same loss.

24. In this case, the respondent is the administrator of the deceased's estate but as correctly pointed out by the learned trial magistrate, he was not the deceased's dependent. He only represented his estate for whose benefit damages under the *Law Reform Act* were awarded. As he is not supposed to benefit from the award for loss of dependency made in favour of the deceased's mother, *Ms Jane Muthoni Namu*, there is no possibility of double compensation in this case.

It is thus my finding that the learned trial magistrate did not err when he failed to deduct the conventional award of KShs.100,000 awarded to the deceased's estate under the *Law Reform Act* from the award for loss of dependency under the *Fatal Accidents Act*.

25. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. The award of KShs.848,000 for loss of dependency is consequently set aside and is substituted with an award of KShs.700,000.

26. Costs follow the event and are also at the discretion of the court. The order that best commends itself to me on costs is that the respondent is awarded costs of the suit in the lower court but each party shall bear his own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Ms Mwinzi: Court Assistant