



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 134 OF 2015

SIGNON FREIGHT LTD.....1ST APPELLANT

DAVID KIPKOECH MISOI.....2ND APPELLANT

-VERSUS-

SIMON KAMAU GITHEMBA (as the legal representative or administrator

of the estate of the late James Ndungu Kamau – Deceased).....RESPONDENT

(An appeal from the judgment and/or decree of honourable M.K.N. Maroro Senior Principal Magistrate in Nakuru CMCC No. 955 of 2013 delivered on 11th November 2015)

JUDGMENT

1. This appeal arises from a suit filed in the lower court by the respondent representing the state of the deceased **James Ndungu Kamau** against the respondent seeking general and special damages from the appellants/respondents following the deceased's death in an accident which occurred on 2nd day of June 2011 involving the 1st respondent's vehicle registration number KAM 092H driven by the 2nd respondent along Nakuru –Gilgil road.

2. Parties recorded consent on liability at 40:60 in favour of the plaintiff. Damages were assessed by the trial magistrate as follows: -

- a. Pain and suffering.....kshs 100,000
- b. Loss of expectation of life.....kshs 200,000
- c. Loss of dependency.....kshs 1,338,448.80
- d. Special damages.....kshs 45,000

3. Judgment was entered against the defendants jointly and severally.

4. The Appellants being aggrieved by the judgment of the trial court filed a Memorandum of Appeal dated 20th November 2015 seeking the Court to allow the appeal by reversing and setting aside of the judgment and decree of the trial Court on the following grounds:-

- i. That the learned trial magistrate erred and misdirected himself as to the exact nature of the respondent's fatal injuries and therefore erred in law in his assessment of damages awardable to the respondent which was manifestly excessive;
- ii. That the learned trial magistrate erred in assessing damages and failed to apply the principles applicable in awarding damages and comparable awards made for analogous injuries.

5. On 19th of July 2018 directions were given that the appeal to be canvassed by way of written submissions. Both parties filed in their submissions.

APPELLANTS' SUBMISSIONS

6. The appellants submitted that they have no issue with liability and they are only appealing on quantum. The appellant's arguments are that the damages awarded to the respondent was excessively and the trial Court failed to take into account the applicable principals of law in awarding damages and comparable awards for analogous injuries.

7. The appellants cited the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** and the case of **Mbogo vs Shah & another (1968) EA 93** where it was observed that the Appellate Court can only interfere with the exercise of discretion by the inferior Court in award of quantum of damages if it is satisfied the trial Court applied the wrong principles by taking into account irrelevant facts and leaving out relevant facts or misapprehended the evidence thus arriving at a wrong conclusion or figures that are so inordinately high or low.

8. The appellant submitted that under the Fatal Accident Act; they submit on **the loss of dependency**. Respondent failed to produce any evidence in support of the earning of the deceased per month, the number of years the deceased could have gainfully worked and the number of dependants who were depended of him; that the trial Court erred in awarding as the deceased was a student aged 16 years therefore unemployed at the time of his death; further that the respondent did not produce any letter from the chief to show dependency ratio or any evidence to show their relationship. The appellate further submitted that the Court should have awarded a global sum general damaged for loss of dependency at Kshs. 300,000/= as held in the case of **Daniel Kiamba Kimithi & 62 Others V David Mutiso Kiilu & 4 Others (2016) eKLR**, deceased was aged 14 – 19 years and was awarded a global sum of Kshs. 300,000/=.

9. Under the Law Reform Act, the appellant submitted that an award of Kshs. 100,000/= for **pain and suffering** was inordinately high as the deceased died instantly after the occurrence of the accident. The appellant proposed an award of Kshs. 10,000/= as being adequate and relied on the case of **Re Estate of Fred Gekonge HCCA No.95 of 2009 Kisii** (an awarded of Kshs. 10,000/= . Died on the spot) and **Patrick Jacob Ouma Vs Tawfiq Bus Services HCC No. 41 of 1998 Mombasa** (an award of Kshs.10,000/= . There was doubt if he died instantaneously).

10. Under Loss of expectation of life, the appellant proposed an award of Kshs. 70,000/= instead of Kshs. 200,000/= awarded. Appellants submitted that the deceased died at the age of 16 years, was a student and it is therefore hard to deduce what he would have become or earned in the future. Further, no academic excellence documents were produced and the Court should not speculate and determine the career path or earning of the deceased. Appellant submitted that this was a blind conclusion based on a wrong principal as the same was not supported by any evidence. They relied on the case of **Abdi Kadir Mohammed & Another V John Wakaba Mwanghi (2009) eKLR**. Deceased was aged 21 and awarded Kshs. 70,000/=.

11. Appellants submitted that special damages are not in dispute and a total of Kshs. 255,000/= would be adequate compensation.

RESPONDENT'S SUBMISSION.

12. The respondent's advocate submitted the appellant awarded Kshs. 1,028,067.30 in the lower court and the respondent is the legal administrator of the estate of the late **James Ndungu Kamau** vide a grant of Letters of Administration issued in Naivasha Succ Cause No. 4 of 2013 and was therefore seeking compensation payable to the estate of the deceased as a legal representative. They relied on **Order 42 Rule 4** of the **Civil Procedure Rules** that the appellant submits on a ground that was not in the memorandum of appeal.

13. The appellant further submitted that the trial court arrived at an appropriate award of damages which were proportionate to the injuries suffered. That on pain and suffering the award of Kshs. 100,000/= was reasonable as the trial court observed that the deceased died on the same date due to severe head injury/fractured rib and haemorrhax making it a painful death; that the respondent had proposed an award of Kshs. 200,000/=

14. Further that an award of 200,000/= under Loss of expectation of life was reasonable and the respondent had proposed kshs 300,000/= while the Appellants had proposed a sum of Kshs. 100,000/=. The respondent submitted that the appellant has not justified why they want the award interfered with.

15. The respondent submitted that under Loss of dependency, the respondent testified as the father to the deceased and produced a letter from **Kikopey Ranch Secondary** to confirm the deceased was a student and grant of letters of administration to prove dependency. Further that in the trial court, the appellants had submitted for a multiplicand of Kshs. 6,221/= dependency ratio of 1/3 and multiplier of 20 years making a total of Kshs. 497,680/= but the trial court used the minimum wage of Kshs. 8,579.80, dependency ratio of 1/3 and a multiplier of 39 years; and the appellants had suggested a dependency ratio of 1/3 therefore he should only be appealing on the issue of multiplicand and multiplier. The Respondent submitted that the appellants has diverted from what they had submitted in the lower court thus raising new issues.

16. The respondent submitted that the appellants failed to demonstrate to the Court why the appellate court should interfere with the discretion of the trial court in the assessment of quantum of damage.

ANALYSIS AND DETERMINATION

17. As captured above, the appellants are appealing only on quantum and they recorded consent on liability in the lower court on 18th May 2015 to have liability apportioned at 40:60 in favour of the plaintiff.

18. From the submissions, award under special damages is not challenged. I also note that the appellants had submitted for dependency ration of 1/3 under loss of dependency. What is in issue under that heading is multiplicand and multiplier. The applicant had proposed 20 years and the Court gave a multiplier of 39 years the deceased having been 16 years at the time of death. By granting 39 years the Court presumed the deceased would work up to the age of 55 years.

19. However, in my view the multiplier was on the higher side as the deceased was a student and would have taken some years before starting to work and make earnings. It is not certain that he would have also lived to retirement age due to uncertainties in life. A multiplier

of 29 years would be reasonable in my view. Minimum wage was used by the court; in view of the fact that it is difficult to tell career path of a child at that age, it was reasonable to apply minimum wage. I will not therefore interfere with the multiplicand and under the heading of loss of dependency I will award as follows: -

- a. $8579.80 \times 29 \times 12 \times 1/3$kshs 995,164
- b. Less 40%.....398,065.60)
- c. Net.....597,098

20. I have considered evidence and submissions in respect to awards under pain and suffering, loss of expectation of life and find the awards reasonable and will not therefore interfere.

21. In summary the awards are as follows

- i. Pain and suffering..... kshs 100,000
 - ii. Loss of expectation of life.....kshs 200,000
 - iii. Loss of dependency.....kshs 995,164
 - iv. Special damages.....kshs 45,000
- SUBTOTAL.....kshs 1,340,164.60
- Less 40%.....kshs 804,098.80
- NET.....Kshs 804,098.80

22. FINAL ORDERS

1. Appeal partly succeed. The multiplier under loss of dependency is reduced to 29 years. The rest of the awards to remain as assessed by the trial court.

2. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru This 17th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jennifer - Court Assistant

Mr. Munyere holding brief for Mr. Murimi Counsel for the Appellant.

Mr. Ndubi counsel for Respondent