



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 314 OF 2015

JOSEPH MWANGI.....1ST APPELLANT

CHARLES MWANGI KINGORI.....2ND APPELLANT

-VERSUS-

ROSE CAROLYNE AKINYI ODERA & EMMANUEL OUMA ANDALA (Suing on behalf

of the dependants and the estate of PATRICK JUMA OSIRI-deceased).....RESPONDENTS

(An appeal from the judgment delivered by Honourable A. Murage (Mrs.) (Chief Magistrate) on 8th April, 2015 in Civil Suit No. 3816 of 2012)

JUDGMENT

1. The appellants were the defendants in Chief Magistrate's Civil Suit No. 3816 of 2012. In the aforesaid suit, the respondents who were the plaintiffs, filed a plaint dated 12th July, 2012 as the personal representatives of the estate of Patrick Juma Osiri who died in an accident alleged to have occurred on or about the 14th of November, 2009.
2. The respondents pleaded that, on the material day, the deceased was standing at a bus stage along Outer Ring road in Nairobi when motor vehicle registration number KAT 568N alleged to have been owned by the 2nd appellant and driven by the 1st appellant was negligently driven that, it knocked down the said deceased thereby sustaining fatal injuries.
3. The respondents further pleaded the particulars of negligence, adding that at the time of his demise, the deceased was in good health and the sole bread winner of his household. The respondents consequently prayed for special damages amounting to Kshs.108,375/= and general damages under both the Fatal Accidents and Law Reform Acts.
4. The appellants filed their statement of defence on 3rd September, 2012, denying both liability for the accident and ownership of the subject motor vehicle; that in the alternative, there was contributory negligence on the part of the deceased. The particulars of injuries and damages were similarly disputed.
5. The respondents filed a reply to defence on 17th September, 2012.
6. The parties entered into consent on liability in the ratio of 80%:20% in favour of the respondents, thereby leaving the issue of quantum to be assessed by the trial court.
7. One (1) witness gave evidence in support of the respondents' case and since the appellants did not call any witnesses, parties were directed to file and serve written submissions. Only the respondents' submissions are on the record. Ultimately, the trial magistrate delivered her ruling in favour of the respondents by making an award of Kshs. 2,628,225/= as general damages less 20% liability as per the consent.
8. Being dissatisfied with the abovementioned decision, the appellants have lodged an appeal to this court. The memorandum of appeal dated 24th June, 2015 is premised on six (6) grounds. The appeal is on quantum of damages.
9. In analyzing the *first* ground of appeal, the appellants vide their submissions filed on 15th October, 2018 argued that the trial magistrate failed to consider their submissions as having been duly filed. In their rival submissions filed on 11th September, 2018, the respondents by and large contended that the submissions relied upon by the appellants were not part of the trial court's proceedings since they were not filed in accordance with the order made by the trial magistrate. Further, that the aforesaid submissions were later on expunged from the record and the appeal is therefore defective, made in bad faith and intended to waste this court's time.

10. This court has looked at the proceedings of the lower court and established that when the matter was before the trial magistrate on 31st March, 2015 for mention to confirm filing of submissions, it was recorded that only the respondents had filed submissions. There was no attendance on the part of the appellants. The trial magistrate consequently gave a judgment date and went ahead to deliver her judgment as scheduled.

11. This court has further noted that on 8th March, 2018 when the matter came up before Honourable Justice Mbogholi Msagha, Mr. Muthee, counsel for the respondents, applied for the appellants' submissions in the lower court to be expunged. In the end, the judge ordered that the impugned submissions shall not form part of the record.

12. From the above, it is evident that the trial magistrate had no reason to consider the appellants' submissions as the same were noticeably not before her at the time of writing her judgment. In fact, it would appear the submissions were filed just one (1) day prior to the delivery of the judgment. The aforesaid submissions could not have been relied upon as they were filed unreasonably late in the day. In any case, the disputed submissions have since been expunged from the court record. Consequently, this ground fails.

13. I will now consider the remaining grounds of appeal collectively.

14. It was the appellants' contention that the award made under the Law Reform Act ought to have been deducted from any award made under the Fatal Accidents Act, since the beneficiaries under both statutes are the same and allowing such an award to stand would amount to double compensation. The case of *Transpares Kenya Limited & Another v SMM (Suing as the legal representative for and on behalf of the estate of EMM (Deceased) [2015] eKLR* was cited. The respondents on their part only mentioned in passing that the trial magistrate awarded damages under both statutes.

15. *Section 2(5)* of the Law Reform Act, Cap. 26 stipulates that:

“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 dependants of deceased persons by the Fatal Accidents Act...”

16. My understanding of the above is that there is nothing that bars a party from claiming damages under both statutes as long as the court, in making its award, takes this fact into account. Reference is made to the Court of Appeal case of *Hellen Waruguru Waweru v Kiarie Shoe Stores Limited (2015) eKLR* where the learned judges reasoned as follows:

“...duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise...”

17. The judges in the cited case in turn referred to the analysis in *Kemfro Africa Ltd t/a Meru Express Services (1976) & Another v Lubia & Another (No. 2) [1987] KLR 30* that:

“The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

18. Having established the above, this court now turns its attention to the lower court judgment. It is clear that the learned trial magistrate, in assessing quantum of damages, relied upon the case of *Kemfro Africa Ltd* (supra) and well appreciated that the benefit inherited under the Law Reform Act should be taken into account when making an award under the Fatal Accidents Act. Having perused the said judgment, I find that there is no indication that the respondents had a twofold benefit under both statutes. In fact, the learned trial magistrate awarded the sums of Kshs.20,000/= for pain and suffering, and Kshs.100,000/= for loss of expectation of life respectively solely under the Law Reform Act. Furthermore, the above cited Section 2(5) of the same Act is clear that the rights conferred therein shall be in addition to those conferred to the dependants under the Fatal Accidents Act.

19. It was further submitted by the appellants that, the award was made in the absence of proof of loss of dependency. I have perused the plaint and in specific, paragraph 7 which particularizes the dependants of the deceased. The appellants' contention is that there is no proof of dependency, arguing that siblings are not dependants under *Section 4(1)* of the Fatal Accidents Act and they have cited the authority of *Chania Shuttle v Mary Mumbi [2017] eKLR*.

20. Section 4(1) states that:

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and children of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased...”

21. The above provision clearly defines the legal beneficiaries. Siblings do not fall in that category. It is true that PW1 did testify on cross-examination that the deceased had been supporting his mother and brother prior to his death. Be that as it may, the learned trial magistrate appears to have considered the wife and children of the deceased in making her award on damages for loss of dependency and the deceased's mother is rightfully catered for under the above-cited provision. There is no indication that the trial magistrate regarded the deceased's

brother as a beneficiary/dependant in granting the award.

22. The appellants further submitted that given the age of the deceased at the time of his demise, the award of damages made by the trial magistrate was inordinately high and made without considering the comparable awards. The appellants in turn contended that the award made on the basis of a dependency period of 20 years was erroneous since the deceased was 35 years at the time of his death and his youngest dependant was aged 11 years. That a dependency period of 10 years would have sufficed.

23. According to **Section 3** of the Insurance (Motor Vehicles Third Party Risks) Act, the term “dependency” is understood to mean:

“that part or portion of the deceased’s earnings that he or she spent on maintenance or financial support of his or her dependants or in the case of a person who was not in employment, reasonably anticipated earnings.”

24. It is recognized that the youngest dependant of the deceased was indicated as being 11 years of age. That notwithstanding, the trial magistrate envisioned that deceased would have possibly continued to sustain an income for the next 20 years and retired at about 55 years of age and this explains the application of a multiplier of 20 years by the trial magistrate. In those 20 years, the deceased would one way or another have conceivably continued to support or otherwise maintain his dependants, including his wife. To my mind, the multiplier of 20 years was reasonable and I would be hesitant to interfere with the same. Either way, the age of the youngest dependant is only one of a number of factors that the trial court was expected to consider.

25. The appellants quoted the case of *Kemfro Africa Ltd v/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* which I will draw reliance from in this respect:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that; it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

26. This brings me to the other factor in question on whether or not the award made is unreasonably high. This court has looked at comparable awards made in related cases. Just to cite a few, in *General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR* where the deceased was 20 years of age, the court opined that an award of Kshs.500,000/= for loss of dependency was inordinately low and substituted it with an award of Kshs.2,539,200/=, deciding as follows:

“The deceased must have been spending part of the money on himself and providing for his family as well. I would give 2/3 to his family as dependency ratio. As a mechanic, he would work, in the absence of proof of any ill health, past 60 years as he was not in formal employment. I would, in the circumstances give multiplier of 40 proposed by the respondents.”

27. Similarly, in the case of *Marwanga Jeffern v Jeckton Ochieng Ochieng & another [2015] eKLR* where the deceased was 30 years old at the time of her death, an award of Kshs.1,600,000/= was made for loss of dependency. This court is of the view that in line with the comparable awards, the award made falls well within the range of comparable awards. In essence, the learned trial magistrate correctly applied the relevant principles encompassing the award of damages under circumstances such as these.

28. The appellants moreover contended that there was absence of proof of earnings and hence the minimum wage for a driver at the time ought to have been adopted as a multiplicand. Having perused the record of appeal, I disagree with this argument. There is evidence of the earnings made by the deceased vide the salary vouchers produced by the respondents.

29. Further to the above, upon perusal of the abovementioned salary vouchers, I noted that the net pay indicated therein was premised on advances given to the deceased and which tended to vary from month to month. There is nothing to suggest that the statutory deductions applied to the deceased. What remains constant is the sum of Kshs.15,000/=. This therefore explains the trial magistrate’s decision to apply the multiplicand amount of Kshs.15,000/=. In doing so, I am persuaded that the said magistrate acted reasonably.

30. I base my above view on the Court of Appeal in *Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749* referenced in the *Hellen Waruguru* case (supra) in this sense:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.”

31. Also worth noting is the fact that the appellants refuted the fact that the deceased was an employee of Wings Driving School, arguing that no evidence was adduced before the trial court. In answer thereto, I wish to draw the attention of the parties to the salary vouchers already mentioned. The same indicate that the deceased was an instructor and in turn bear the official stamp of Wings Driving School. Reasonably speaking, this is evidence enough that the deceased was employed there. The appellants’ argument is therefore neither here nor there.

32. The appellants also argued that the learned trial magistrate erred in awarding costs of the suit and interest to the respondents. In response thereto, I am of the opinion that since the case was decided in favour of the respondents, it follows that the learned trial magistrate rightly exercised her discretion in awarding them costs of the suit together with interest. This ground cannot stand.

33. By and large, I am of the opinion that the trial magistrate considered the evidence before her and clearly stipulated the basis on which she proceeded to award the damages.

34. In the end, I do find that the learned trial magistrate's decision was well-founded and I see no need to interfere with the same. Consequently, the appeal lacks merit and stands dismissed with costs to the respondents. The Respondents shall also get the costs of the lower court.

Dated, signed and delivered at **NAIROBI** this **28th** day of **January, 2019**.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondents