



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 82 OF 2016

CELESTINE JOSEPH NYAMUMBO.....1ST APPELLANT

KEMUNTO TRUFENA.....2ND APPELLANT

VERSUS

DORCA KWAMBOKA MARITA.....1ST RESPONDENT

RACHAEL KERUBO MARITA.....2ND RESPONDENT

(Appeal from the Judgment and Decree of Hon. Maloba (SRM) dated 3rd day of November 2016, in the original Kisii CMCC No. 563 of 2015)

JUDGMENT

1. The deceased was riding motor cycle registration number KMCE 655 Q when he was hit by the appellants' motor vehicle registration number KCB 614S. After his death, his estate and dependants filed suit claiming damages under the *Fatal Accident Act (Chapter 32 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)*. The parties consented to liability in favour of the respondents in the ratio of 70:30. After hearing the matter, the trial magistrate made the following award in favour of the respondents;

Pain and Suffering Kshs. 50,000.00

Loss of Expectation of life Kshs. 100,000.00

Loss of Dependency

(Kshs. 10,000 X 12 X 2/3 X 20) Kshs. 4,200,000.00

Special Damages Kshs. 20,000.00

GROSS TOTAL Kshs. 4,370,000.00

Less 30% NET TOTAL Kshs. 3,059,000.00

2. The appellant appealed against the assessment of damages. It submitted that the award under the Fatal Accident Act were inordinately excessive. It was their case that the respondent did not adduce any documentary evidence to prove that the deceased was a teacher and had an academy, they urged the court to employ the minimum wage of Kshs. 10,107.10/-. To advance their case the appellant extensively quoted *David Kajogi M'mugaa v Francis Muthomi (2012) eKLR*; *Usular Mulandi v Kyalo Mutunga & Others (2017) eKLR*; and *Petrocity Enterprises (U) Ltd v Roseline Sikudi suing as legal rep of the estate of Pascal Ngadi (Deceased) & 2 others (2017) eKLR*. They urged the court to consider the trial court's award of Kshs 50,000/- on pain and suffering excessive and proposed an award of Kshs. 20,000/-. While relying on the principles set in *Charles Omwenga Ongiri & another vs Daniel Muniko (2017) eKLR* they submitted that the court should offset the award under loss of expectation of life from that made under loss of dependency as this amounts to double entitlement.

3. The respondents in their submissions urged this court to consider the evidence before the trial court as the respondent testified that the deceased was a teacher earning Kshs 120,000/-. It submitted that the multiplier of 15 years was not excessive as the deceased was not a government employee and the retirement age of 60 would thus not apply. She relied on the case of *Beatrice Nyanchama Obuya vs Hussein Dairy Limited (2010) eKLR*. It submitted that the award for pain and suffering and loss of expectation of life under Law Reform Act does not amount to duplicity- *Richard Matheka Musyoka & another vs Susan Aoko & Another (suing as the administrators of Joseph Onyango Owiti- deceased) 2016 eKLR*.

4. The respondents in their plaint dated 8th December 2015 averred that the deceased was aged 45 years old at the time of his death and was a farmer/ business man earning about Kshs 50,000/- per month. The deceased left behind a widow and six children, one of whom is an adult. When the matter came up for hearing before the trial court, the deceased's wife, Dorcas Kwamboka (Pw1) testified that the deceased was a teacher and had his own school, Green Hill Academy, from which he derived a monthly salary of Kshs. 120,000/-.

5. In dealing with the issues in contention, I must bear in mind the extent to which an appellate court may interfere with an award of damages. The general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd v Meru Express & Another v A. M. Lubia and Another [1982-1988] KAR**).

6. It was the appellant's submission that the amount of Kshs 50,000/- awarded for pain and suffering was excessive as the deceased died on the spot. The principle on how to make an award on pain and suffering was stated in the case of **Sukari Industries Limited v Clyde Machimbo Juma HB HCCA No. 68 of 2015[2016]eKLR** that:

[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.

7. In their submissions before the trial court the appellants proposed an award of Kshs 10,000/- for pain and suffering quoting the case of **Awadh Ahmed Awath vs Shakil Ahmed Khan Mombasa HCC No. 287 of 1990**. The respondent proposed the award of Kshs 50,000/- on pain and suffering where the deceased died on the same day and relied on the case of **John Karanja Wainaina vs Elijah Oketch Adellah, Nairobi Hccc No. 191 of 2013**. The trial court relied on the case proposed by the respondent in making the award of Kshs 50,000/-. I find and hold that the amount awarded by the trial court on pain and suffering cannot therefore be said to be excessive.

8. I now turn to the issue of double compensation, which was settled by Waki, Nambuye & Kiage, JJA in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** as follows:

"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; 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."

9. In consideration of the above principle I hold that the trial court was entitled to make awards under both the Law Reform Act and the Fatal Accidents Act.

10. Finally, was the award on dependency under the Fatal Accident Act excessive? Pw1 testified that the deceased was a teacher who ran a business in the form of a learning institution and derived an income of Kshs 120,000/-. In the plaint it was alleged that the deceased was a teacher/businessman and earning a monthly income of Kshs 50,000/-. No proof of income was adduced before the court. It was also not clear the kind of school operated by the deceased, or the kind of teaching qualifications held by the deceased. The trial magistrate held as follows:

"I note this evidence concerning the existence of such a business or enterprise was not controverted on record. In fact, no evidence was called by the defence in its rebuttal. In spite of lack of documentary evidence on the same, I am convinced by the oral evidence of the 1st plaintiff that the deceased was indeed in the business of running in academy.

.....

In my own view, the most reasonable way to go about this matter is to consider the income that the deceased would have earned as a government Primary School teacher (TSC) supposed he had been in its employment. He was aged 45 years meaning that under TSC, he would have been deemed to have attained Senior Teacher Level earning roughly between Kshs 30,000-35,000. This is just a general estimate as I am not privy to the applicable actual salary scale of Government teachers."

11. I am constrained to find that the trial court erred in using a multiplicand of Kshs 35,000/-. It is clear that the deceased was not employed by the Teachers' Service Commission and his qualifications are unknown. Submissions by the appellants to fall back on the minimum wage is not supported by the facts of this case. Though the respondents pleaded that the deceased made Kshs 50,000/-, evidence by Pw1 was a contradiction of that proposal. It is clear that the respondent could not tell how much the deceased made from the school. No documentary evidence was produced to support the amounts claimed by the respondent. The Court of Appeal in **Theta Tea Company Ltd & Another v Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002]eKLR** expressed the view that;

"Where it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors."

12. In the circumstance, I find the multiplier approach in this case would be unsuitable and adopt a lump sum approach. **I allow the appeal**

to the extent that I set aside the trial court's judgment on loss of dependency under the *Law Reform Act* and substitute the same with a lump sum award of Kshs. 2,000,000/- which shall accrue interest from the date of judgment in the subordinate court. The appellant shall have costs of the appeal.

Dated, signed and delivered at Kisii this 28th day of February 2019

R. E. OUGO

JUDGE

In the presence of;

Mr. Nyangacha h/b Mr. O. Otieno For the Appellants

Mr. Wesonga h/b Ms Kusa For the Respondents

Rael Court clerk