



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 78 OF 2016

GILBERT NYANGAU OYUGI.....APPELLANT

VERSUS

CHARLES ONDEGO ONDUSO &

SALUME MORAA ONDUSO

(Suing as legal representatives of the estate of)

DOMINIC MOSE ONDUSO.....RESPONDENTS

(An appeal from the judgment and decree of Hon. N. Wairimu (Principal Magistrate)

dated 28th day of September 2016 in Ogembo PMCC No. 18 of 2015)

JUDGMENT

1. The respondents, suing in their capacity as the administrators in the estate of the late Dominic Mose Onduso, filed PMCC No. 18 of 2015 against the appellant for special and general damages following a fatal accident that occurred on 8th August 2014 along Kisii – Kilgoris road. The parties entered consent on liability in the ratio of 80:20. The trial court made an award for Kshs.73, 300/= for special damages; Kshs. 100,000/= for loss of expectation of life; Kshs. 50,000/= for pain and suffering and Kshs. 1,192,800/= for loss of dependency less 20% contribution of Kshs.268, 560/= bringing the sum total to Kshs. 1,147,540/= plus costs and interest.

2. The appellant has preferred this appeal against the decision of the trial court on the following grounds;

- i. That the award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance;
- ii. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision;
- iii. The learned trial magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice; and
- iv. The learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.

3. At the hearing of the appeal, counsel for the appellant submitted that the appeal was on the quantum of damages which he argued was inordinately high. The appellant also filed written submissions where he contends that the multiplier of 35 years was excessive. He submits that the dependency ratio adopted by the trial court of 2/3 was equally extravagant as the deceased was unmarried and therefore had no other dependants. The appellant further submits that the trial court erred when it made an award for both loss of expectation of life and loss of dependency which in his view was tantamount to double entitlement. On the award of special damages, the appellant argues that the respondent was only entitled to Kshs. 20,500/= which is what he had proved.

4. The respondent's counsel opposed the appeal and relied on the submissions filed in the lower court.

5. Having considered both parties' submission and Record of appeal, the following issues arise for determination;

- i. Whether the trial court erred in adopting a multiplier of 35 years;
- ii. Whether the dependency ratio of 2/3 was appropriate in this case;
- iii. Whether the respondents were entitled to an award under the head of loss of expectation of life simultaneously with an award for loss of dependency;
- iv. What amount the respondents were entitled to for pain and suffering; and
- v. What amount the respondents were entitled to under special damages.

6. In dealing with the foregoing issues, I am mindful of the well settled principle that an appellate court will not ordinarily disturb an award of damages unless it is shown that the trial court proceeded on wrong principles of law or misapprehended the evidence in some material way as to reach an amount inordinately high or low. (See **Butt v Khan, [1981] KLR 349.**)

7. At paragraph 6 of the plaint dated 3rd January, 2015, the respondents particularized their claim for damages under the Fatal Accidents and the Law Reform Act. It was pleaded that at the time of his demise, the deceased was aged 25 years enjoying a good, healthy and vigorous life and was of great assistance to his family who depended on him for support. According to the plaint, his only dependant was his mother. The deceased's brother who was one of the administrators of his estate testified as the sole witness.

8. The dictum on assessment damages under the Fatal Accident Act was set out by the Court of Appeal in **Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749** thus;

“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.

9. The appellant contends that a multiplier of 25 years is suitable for the deceased who died aged 25 years. The appellant relied on the case of **David Kajogi M'mugaa v Francis Muthomi Civil Appeal 118 of 2010 [2012] eKLR** where the Court adopted a multiplier of 25 years where the deceased died aged 23 years. The appellant also relied on the case of **Petrocity Enterprises (U) Ltd v Roselina Sikudi suing as legal representative of the Estate of Pascal Ngadi (deceased) & 2 others Civil Appeal No. 39 of 2015 [2017]eKlr** where the court proposed a multiplier of 15 to 25 years for the deceased who died aged 28 years.

10. The respondent on his part suggested a multiplier of 35 years. He relied on the case of **Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adellah Civil Suit No. 191 of 2013 [2015]eKLR** where the court applied a multiplier of 35 years for the deceased who died at the age of 28 years.

11. In electing a multiplier of 35 years, the trial court considered that the deceased who was aged 25 years at the time of his death, would have worked until the conventional retirement age of 60 years. I note that the deceased was a young man with promise of a long productive life at the time he died. He was self-employed and would probably have worked beyond the age of 60 years. However the trial court failed to factor in the vicissitudes of life in reaching its decision. Taking into account the preponderances of life, I find a multiplier of 30 years suitable in this case. As both parties proposed a dependency ratio of 1/3 in the lower court, I set aside the dependency ratio of 2/3 adopted by the court. The multiplicand of Kshs. 4,260/= was not contested therefore damages for loss of dependency is computed at **Kshs. 511,200/=** made up as follows:

Kshs. 4,260/= x 30 years x 12 months x 1/3 = Kshs. 511,200/=

12. Turning to the question of whether the trial court should have discounted the amount awarded under loss of expectation of life from loss of dependency, the Court of Appeal considered this issue in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited Civil Appeal No. 22 of 2014 [2015] eKLR** and rendered itself thus;

*“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.”*

13. Consequently, I uphold the award of Kshs. 100,000/= for loss of expectation of life. On pain and suffering, the respondent's witness testified that the deceased had died on the spot and therefore did not suffer greatly. It is apparent the trial court was persuaded by the case of **Francis Wainaina Kirungu v Elijah Oketch Adellah (supra)** where the court in 2015 awarded Kshs. 50,000/= for pain and suffering where the deceased had died soon after the accident. In the case of **Awadh Ahmed Awadh v Shakil Ahmed Khan Civil Suit No. 287 of 1990** which was relied on by the appellant to guide the court on this head, Waki J. awarded a sum of Kshs.10,000/= in 2001 for pain and suffering. I find no reason to interfere with the trial court's determination on pain and suffering.

14. On special damages, the appellant argues that the respondent pleaded Kshs. 71,600/= but only proved a sum of Kshs. 20,500/= in his list of documents. It is the appellant's contention that the trial court erred in making an award of Kshs. 73,300/=. An analysis of the proceedings shows that the respondent produced receipts to prove special damages and there was no objection to their production as such they formed

part of the record. I therefore uphold the amount awarded by the trial court for special damages. Further, the Court of Appeal in **Premier Dairy Ltd v Amarjit Singh Sagoo & Another C.A. 312 of 2009[2013] eKLR** has found as follows on funeral expenses;

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved.”

15. I would therefore substitute the award made by the trial court with an award of **Kshs. 587,600/=** made up as follows:

i. General damages for loss of dependency Kshs.511,200/=

ii. Loss of expectation of life Kshs. 100,000/=

iii. Pain and suffering Kshs. 50,000/=

iv. Special damages Kshs. 73,300/

Total 734,500/=

Less 20% contribution of Kshs. 146,900 /=

Kshs. 587,600/=

16. As the appeal has only been partially successful, each party shall bear its costs. Interest shall accrue on the above sum at court rates.

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 Appellant

Mr. Wesonga h/b Ms Kusa For the Respondent

Rael

Court clerk