



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL APPEAL NO. 43 OF 2017**

**JOSEPH NDIRANGU THUO.....1<sup>ST</sup> APPELLANT**

**DAVID MAINA GATHERU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**KAMAU NGUGI (suing as the legal administrators**

**of the estate of PETER WAWERU).....RESPONDENT**

**(Being and appeal from the Judgment of Hon E Riany, R.M. delivered on 3<sup>rd</sup> May, 2014 in Naivasha CMCC No 516 of 2010)**

**JUDGMENT**

**Background**

1. This is an appeal against the quantum awarded by the lower court. The award was for an accident that occurred on 9<sup>th</sup> December, 2009 along Naivasha Nairobi road.

2. Judgment was entered on 3<sup>rd</sup> April, 2014 granting damages as follows:

*“Pain and suffering Kshs 25,000/=*

*Loss of expectation of life Kshs 100,000/=*

*Lost years Kshs 1,065,404/=*

*Less 50% Kshs 545,202/=*

*Add special damages Kshs 24,000/=*

*Total Kshs 1,090,404/= less 50%*

*Amount awarded Kshs 569,202/=”*

3. In their appeal dated 30<sup>th</sup> April, 2014, the appellants seek that the court overturn the trial magistrate’s finding that the dependency ratio used by the trial court was 2/3 whilst there was evidence on record that the deceased was not married and had no children. The appellants also urge that trial magistrate also erred in adopting a minimum wage of Kshs.8,834/= yet there was no documentary proof of any earnings.

**Analysis and determination**

4. The role of this court on first appeal is to evaluate the evidence adduced at first instance and make its own findings. In so doing, the court must take caution in that it must be mindful that it did not have the opportunity to hear the witnesses or see their demeanour. Further, in line with leading case of **Mbogo v Shah (1968) EA 93.**, the court must not exercise its discretion to interfere in an award of damages unless it can be shown that the lower court misdirected itself in some matter as a result of which it arrived at a wrong decision or unless it is manifest

that the trial court was wrong in exercising its discretion and thereby occasioned a miscarriage of justice.

#### *The issue of income*

5. The evidence by the deceased's father was that his son was 25 years old at the time of the accident and a businessman who sold vegetables in a kiosk at the market; that his son was not married and did not have any children; that the deceased lived with him at home and hence paid no rent. He further stated that deceased used to sustain him together with his wife and that he would also bring him foodstuff and give them cash in the amount of Kshs.3,000/= per month which they would use to educate the deceased's siblings. He added that the siblings were still in school at the time. His testimony was finally that the deceased earned about Kshs, 9,000/= per month though he had nothing to prove his monthly income.

6. The deceased's father also testified that the deceased was his first born son and at the time of trial the 2<sup>nd</sup> born was 30 years and that four have since left. He said he had a total of 5 children. He said that he had 2 children who were working, one as a clerk and the last born was clothes dealer. None of the other children assisted in the way the deceased used to assist.

7. The appellant correctly asserts that the trial court used a multiplier of 15 years and a dependency ratio of 2/3. The judgment states at page 49 record of appeal:

***“The minimum wage then was 8,834.20 using a multiplier of 15 years and dependency ration of 2/3 since he was not married:***

$$8,834.20 \times 2/3 \times 15 \times 12 = \text{Kshs } 883,420.00 = \text{Kshs } 1,065,404/=”$$

I note that the above calculation has an error in any event, and should have given a result of Kshs 1,060,104/=.

8. In the case of **Jacob Ayiga Maruja & Another v Simeon Obayo CA167/200 [2005] eKLR** the Court of Appeal rendered itself on the question of failure to adduce proof of income, as follows:

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”***

9. Whilst the respondent could have done better by adducing some sort of documentary evidence of the deceased's income, the court cannot entirely disregard the evidence adduced, taking into account the informal nature of the business the deceased was engaged in and the Court of Appeal decision above in **Jacob Ayiga Maruja's case**.

10. With regard to dependency, there was no evidence that there was any money given to the deceased's parents, but again it is highly uncommon for parents in the rural areas to maintain such records.

11. In light of the foregoing, I am of the view that this court should not interfere with the learned trial Magistrate's finding regarding the deceased's income. I find that it was proper for the court to rely on the then minimum wage of Kshs 8,834.20 per month.

#### *The issue of 2/3 multiplicand*

12. It would appear from a review of the decisional law on this point that our Courts tend to lower the dependency ration when the deceased is an unmarried child and the claimant is the parent. This is occasioned by the presumption that such a child spends less at home by virtue of being unmarried, a presumption that can be rebutted by actual evidence.

13. A number of authorities attest to this point. In **Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 others (2006) eKLR** the court used a multiplier of 20 years on a 26 year old unmarried lady and a dependency ratio of ½. Similarly, in the case of **Alice O. Alukwe v Akamba Public Road Services Ltd (2013) eKLR**, the court used a dependency ratio of 1/2 on an unmarried lady aged 24 years. In **Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR**, the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years.

14. The principle that the Court will use a lower dependency ratio where the deceased was unmarried and therefore less inclined to spend his or her earnings at home, clearly emerges from these cases. In light of the foregoing emergent practice, I would agree that the use of a dependency ratio of two-thirds (2/3) in the present case was unusually high.

15. I would therefore apply a ratio of one-half (1/2) in the circumstances of this case, which is consistent with the current court practice. I do so apply the said ratio with the result that the damages for lost years are now calculated as follows:

$$8,834.20 \times \frac{1}{2} \times 12 \times 15 = \text{Kshs } 795,078/=.$$

#### **Disposition**

16. Accordingly, the appeal succeeds to this extent and the award for lost years shall be **Kshs 795,078/=**.

17. Thus the total award shall be as follows:

Pain and suffering Kshs 25,000/=

Loss of expectation of life Kshs 100,000/=

Lost years Kshs 795,078/=

Total Kshs 920,078/=

Less 50% liability Kshs (460,039/=)

Add special damages Kshs 24,000/=

**Total Award Kshs 484,039/=**

18. The plaintiff is awarded **Kshs 484,039/=** with interest from the date of the lower court judgment.

19. Each party shall bear its costs of the appeal.

20. Orders accordingly.

**Dated and Delivered at Naivasha this 28<sup>th</sup> Day of February, 2019**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. No representation for the Appellants
2. Ngunjiri holding brief for Owuor for the Respondent
3. Court Clerk - Quinter Ogutu