



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 7 'A' OF 2017

1. ALICE OMBACHI.....1ST APPELLANT

2. EDWIN MANOTI.....2ND APPELLANT

=VRS=

JERUSHA KEMUNTO MOKAYA & JOSHUA AGETA

MOKAYA [Suing as Legal Representatives and Administrators of the

Estate of RISPER NYABOKE MOKAYA (Deceased)].....RESPONDENTS

{Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM dated and delivered on the 4th day of April 2017 in the original Nyamira Principal Magistrate’s Court Civil Case No. 175 of 2016}

JUDGEMENT

1. This appeal is on the quantum of damages awarded for loss of dependency, pain and suffering and expenses incurred (special damages). Liability was agreed between the parties.

2. The appeal is premised on grounds: -

“1. That the Learned Magistrate erred in law and in fact by awarding excessive damages to the respondents amounting to Kshs. 11,980,334/=.

2. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

3. That the Honourable Learned Magistrate misdirected herself by failing to consider the submissions by the Appellant while arriving at the judgement.”

3. The appeal which is vehemently opposed was canvassed by way of written submissions.

4. For the appellant, it was argued that the trial magistrate erroneously awarded the respondent special damages of Kshs. 433,344/= which firstly was more than what was pleaded in the plaint by a sum of Kshs. 13,344/= . Secondly, that some of the specials more so the Kshs. 20,000/= in respect of Letters of Administration were not proved and thirdly that the respondent admitted that the funeral expenses claimed were contributions from well-wishers and were not incurred by the respondent. Relying on the case of **Crown Bus Ltd Vs. Geoffrey Mutoko Aweki [2016] eKLR**, Counsel submitted that the respondent was not entitled to the funeral expenses but if this court holds otherwise then only that which was strictly proved which is Kshs. 335,958/= should be awarded.

5. On loss of dependency Counsel for the appellant submitted that although the deceased was 27 years old the trial magistrate erred in law for arriving at a multiplier of 33 years. Counsel faulted the trial magistrate for not following the principle enunciated in the decision of Ringera J in **Beatrice Wangui Thairu Vs. Hon. Ezekiel Barngetuny & Another NBI HCCC 1638 of 1988 (UR)** cited with approval by Joel Ngugi J in the case of **Henry Waweru Karanja & Another Vs. Teresiah Nduta Kagiri Kiambu HCCA No. 16 of 2016** that: -

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable

figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life, and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

Counsel contended that the multiplier of 33 years did not take into account the vagaries and uncertainties of life. Counsel submitted that the deceased probably might have died of a different calamity before attaining the retirement age of 60 years and proposed a multiplier of 20 years. Counsel relied on the case of **JWK Vs. George Omondi & 2 Others HCCC 123 of 2011** where a multiplier of 18 years was applied for a deceased who was 30 years.

6. On the earning of the deceased, Counsel submitted that the same were not proved because the letter from Gilmog General Services which was produced to prove a monthly salary of Kshs. 45,000/= was not part of the plaintiff's list of documents and was not produced by consent of both parties. Counsel submitted that its production amounted to trial by ambush and violated the Civil Procedure Rules 2010. Counsel submitted that the court should have adopted a multiplicand of Kshs. 7,000/=. To support that submission, Counsel relied on the case of **Phillip Musyoka Mutua Vs. Veronica Mbula Mutiso [2013] eKLR** where the court stated:-

“Therefore in the absence of evidence of monthly earnings of the deceased the estimate would be like for an unemployed person where the rate is usually set like for a wage of an unskilled employee which by then stood at approximately Kshs. 6,000/=.”

7. Counsel urged that damages under this head should be calculated as:-

$7,000 \times 12 \times 20 \times 2/3 = \text{Kshs. } 1,120,000/=.$

8. On damages for pain and suffering, Counsel submitted as the deceased died instantaneously and hence did not suffer a lot of pain the award of Kshs. 100,000/= ought to be reduced to Kshs. 10,000/=. On this, Counsel relied on the case of **Samwel Kimutai Korir (suig as personal and legal representative of the estate of Chelangat Silevia) Vs. Nyanchwa Adventist Secondary School & Another [2016] eKLR**.

9. For the respondent it was argued that as the appellant did not adduce evidence to rebut that of the respondent, the case was unchallenged. Counsel relied on the case of **John Wainaina Kagwe Vs. Hussein Dairy Limited [2013] eKLR** where the Judges of Appeal observed: -

“.....The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof.....”

Counsel also cited extensively from the case of **David Kahuruka Gitau & Another Vs. Nancy Ann Wathithi Gitau & Another [2016] eKLR**.

10. Counsel for the respondent drew this court's attention to the principles upon which this court may interfere with the award of the lower court as restated by Lenaola J, as he then was in **Kiwanjani Hardware Ltd & Another Vs. Nicholas Mule Mutinda [2008] eKLR**.

11. On the award for loss of dependancy, Counsel for the respondent submitted that the deceased's earnings were proved through a letter produced at the hearing and the letter cannot be challenged at this stage. On the multiplier Counsel submitted that that was in the discretion of the trial court and this court should uphold the multiplier of 33 years. Counsel cited the case of **Susan Wanjugu Muchemi Vs. James Kabathi Mwangi [2005] eKLR** where a multiplier of 26 years was adopted for a 29 year old. Counsel also put reliance on the following two cases: -

(a) **Jacob Ayiga (Suppra)**.

(b) **Sokoro Plywood Limited & Another Vs. Njenga Wainaina [2007] eKLR**.

Counsel submitted therefore that the award of Kshs. 11,880,000/= was reasonable noting that the dependency ratio of 2/3 was not contested. Counsel urged this court to uphold the award.

12. For pain and suffering, Counsel submitted that the respondent's evidence was that the deceased died 45 minutes after the accident and therefore the trial magistrate was justified in awarding Kshs. 100,000/=. To support this submission, Counsel cited the case of **Alice O. Alukwe Vs. Akamba Public Road Services Ltd & 3 Others [2013] eKLR** wherein Emukule J, awarded Kshs. 50,000/= for a deceased who died on the sport and also **David Kahuruka Gitau (Suppra)** where Mativo J, upheld an award of Kshs. 100,000/= for the deceased who died 30 minutes after the accident.

13. Counsel urged this court to uphold the award of Kshs. 100,000/= for loss of expectation of life which in any case was deducted from the total awarded under the Fatal Accidents Act as it would have amounted to double taxation.

14. On the specials, Counsel's submission was that the respondent proved the sum of Kshs. 433,344/= through receipts. Counsel relied on the decision of the Court of Appeal in **Premier Dairy Ltd Vs. Amarjit Singh Sagoo & Another [2013] eKLR** where it was held: -

“With the above as the material placed before him in respect of the claim for funeral expenses the learned judge addressed the issue thus in the judgement:

.....The plaintiff did not avail any documentary evidence to show the sum of Kshs. 400, 000/= was expended. Nevertheless I think that this court is entitled to conclude that considerable amounts of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety. I think to expect the relatives to keep the receipts of every expenditure incurred is to underestimate the pain and loss of a loved one. Where a party cannot show the amount of expenses incurred the court would weigh the scales of justice in order to address the pertinent issues involved in the matter, From the evidence available, the deceased was a fairly rich businessman and I think the relatives used considerable amount of money to give him a good and decent send off. Such expenses needless to mention includes attending to the needs of mourners and other incidental expenses. I therefore award a sum of Kshs.150, 000/= as funeral expenses as a prudent and reasonable amount to have been used as funeral expenditure

“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 *Tong 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. The learned judge took what was a practical and pragmatic approach.*”

15. Counsel further urged this court to find that the trial court relied on precedents in arriving at the decision, that the appellant’s submissions were considered fully and that this appeal lacks merit.

16. It is trite law that special damages must not only be pleaded but strictly proved. In the case of **Premier Dairy Ltd Vs. Amrjit Singh Sagoo & Another (Suppra)** where the plaintiff had claimed Kshs. 400,000/= which he could not prove the Court of Appeal upheld the award of Kshs. 150,000/= as reasonable and prudent funeral expenses and took 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.”** The court commended the judge of the superior court for taking a practical and pragmatic approach in the case. This case is however different in that the respondent produced receipts for special damages in the sum of Kshs. 433,344/= but then admitted that the monies were contributions received from well-wishers. The respondent did not give a breakdown of what was contributed by the well-wishers and what portion he contributed. However It is my finding that he must have incurred part of the funeral expenses and a sum of Kshs. 150,000/= would be a reasonable estimate of what the family of the deceased incurred. The funeral expenses shall therefore be reduced to that amount. The sum of Kshs. 20,000/= claimed in respect of letters of administration was not proved and will not be allowed.

17. On the award for loss of dependency, this court is guided by the principle in **Kemfro Africa Limited t/a “Meru Express Services 1976” & Another Vs. Lubia & Another (No. 2) [1987] KLR 30** that in considering whether it is justified in disturbing the quantum of damages awarded by a trial court it must be satisfied that the trial court 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.

18. The respondent produced an undated letter from Gilmog General Services certifying that the deceased worked there and earned a net salary of Kshs. 45,000/=. Counsel for the appellant did not object and cannot be heard to do so now. The minimum wage applies where the earnings of the deceased cannot be proved through documentary evidence. The burden of proof in civil cases is on a balance of probabilities and I am satisfied that the letter meets that standard. The trial court did not therefore err by adopting a multiplicand of Kshs. 45,000/=. The dependency ratio of 2/3 was not contested.

For the multiplier the rule as summarized by Ringera J, in **Beatrice Wangui Thairu Vs. Hon. Ezekiel Barngetuny & Another (Suppra)** is that **“in choosing the said figure.... the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature.”**

The trial magistrate does not seem to have considered the above principle. The multiplier of 33 years did not consider what the courts refer to as the vagaries of life. A multiplier of 25 years would in my considered opinion be more reasonable. Accordingly, the damages under the Fatal Accidents Act shall be calculated as follows: -

$45,000 \times 12 \times 25 \times 2/3 =$ Kshs. 9,000,000/=.

19. The award for pain and suffering is also contested. The court heard that the deceased died after 45 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal. See **Benedeta Wanjiku Kimani Vs. Changwon Cheboi & Another [2013] eKLR**. In the case of **David Kahuruka Gitau & Another Vs. Nancy Ann Wathithi Gitau & Another (Suppra)** Mativo J, awarded Kshs. 100,000/= for a deceased who died after 2 days. In this case where the deceased died 45 minutes after the accident an award of Kshs. 50,000/= for pain and suffering is not only fair but reasonable as the court is also enjoined to consider passage of time and inflation. Kshs. 10,000/= is what was awarded in the eighties and the nineties. The award under that head is reduced by Kshs. 50,000/=.

20. The damages for loss of expectation shall remain undisturbed as the same were not contested.

21. The appeal succeeds to the extent aforestated and judgement for the respondent against the appellant shall now be as follows: -

1. Liability 85:15 in favour of the appellant against the respondent.
2. Loss of Dependency (Fatal Accidents Act)

	–	Kshs. 9,000,000/=.
3. Pain and Suffering	–	Kshs. 50,000/=.
4. Special Damages	–	Kshs. 150,000/=.
5. Loss of Expectation of life	–	<u>Kshs. 100,000/=.</u>
Total	–	Kshs. 9,300,000/=
6. Less	–	<u>(Kshs. 100,000/=)</u>
Total	–	<u>Kshs. 9,200,000/=.</u>

7. Costs of the suit in the court below and interest on the specials from the date of filing suit and on the general damages from the date of the judgement in the court below.

8. The appellant shall get half the costs of this appeal.

9. Whatever remains of the award for loss of dependency after reducing the respondent's 15% contribution shall be distributed between the mother of the deceased and the child of the deceased with the latter getting 85% and the former 15%.

10. In the best interest of the child, the child's share if still below 18 years shall be invested in an interest earning account in a reputable bank in the joint names of two guardians and the Deputy Registrar of this Court until she attains 18 years and the child's guardian shall be entitled to withdraw interest thereat for the upkeep of the child and for her benefit only with the leave of this Court and the Deputy Registrar of this Court shall be a signatory to that account.

Orders accordingly.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE