



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 100 OF 2015

MARTHA BOSIBORI ARISA & GEOFFREY AYIERA

ZABLON [Suing as Personal Representatives and Legal

Administrators of the Estate of ZABLON MONGERI ATANDI (Deceased)]....APPELLANTS

=VRS=

GLADYS NYARABU MATUNDURA.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. N. Kahara – SRM dated and delivered on the 26th day of October 2015 in the original Keroka Principal Magistrate’s Court Civil Case No. 225 of 2014}

JUDGEMENT

The appellant in this case sued the respondent for compensation for the death of her husband in a motor accident involving a motor vehicle belonging to the respondent. Liability was agreed in the ratio 80:20% in favour of the appellant. The matter then went for assessment of damages which were awarded as follows: -

1. Liability 80:20
2. Pain and suffering – Nil.
3. Loss of Expectation of life – Kshs. 100,000/=
4. Loss of Dependency – Kshs. 218,784/=
5. Special Damages – Kshs. 70,000/=

Total – Kshs. 388,784/=

6. Less loss of expectancy (sic) of life – Kshs. (100,000/=)
7. Less 20% Contribution – (Kshs. 57,756/=)

Total – Kshs. 231,028/=

The appellant being dissatisfied with the quantum of damages preferred this appeal. The grounds of appeal are: -

- “1. THAT the Learned Trial Magistrate erred in law and in fact in not awarding the Appellants an award under pain and suffering.**
- 2. THAT the Learned Trial Magistrate erred in law and in fact when calculating loss of dependency and/or lost years.**
- 3. THAT the learned trial magistrate awarded a sum that is so low under loss of dependency and/or lost years as to amount to an erroneous estimate of the Appellant’s loss.**
- 4. THAT the judgement of the Honourable Trial Magistrate has occasioned a failure of justice and/or resulted in a gross**

miscarriage of justice.”

By this appeal this court is urged to enhance the award of damages under the Law Reform Act and the Fatal Accidents Acts.

The appeal was canvassed by way of written submissions. As correctly submitted by Counsel for the appellant, this court must observe certain principles before it can interfere with the award of the lower court. These principles were restated in the case of **Paul Kipsang Koech & Another Vs. Titus Osule Osoro [2013] eKLR** where it was held: -

“It is well established law that, assessment of quantum of damages in a claim for general damages is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion; must be exercised judicially, with wise circumspection and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court: -

(a) Took into account an irrelevant fact or

(b) Left out of account a relevant factor or,

(c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

These principles were summarized by Lenaola J, as he then was in **Kiwanjani Hardware Ltd & Another Vs. Nicholas Mule Mutinda [2008] eKLR** where he stated: -

“an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate based on some wrong principle or on a misapprehension of the evidence.”

Having reconsidered the evidence in the court below my finding is that the trial magistrate did not misdirect herself either in law or in fact to justify the interference of the award of damages by this court. On the issue of damages for pain and suffering in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another Vs. Lubia & Another (No. 2) [1987] KLR** the Court of Appeal stated: -

“2. Under the Law Reform Act, it is the deceased’s own cause which services for the benefit of his estate, so the estate should recover the damages the deceased would have recovered but for his death. Damages for pain, suffering, loss of amenities and earnings are for the period he survived so if the death is more or less instantaneous the only damage recoverable will be for the deceased’s loss of expectation of life.”

The courts have however awarded nominal damages where death was not instantaneous. For instance, in **David Kahuruka Gitau & Another Vs. Nancy Ann Wathithu Gitau & Another [2016] eKLR** Mativo J, upheld an award of Kshs. 100,000/= where the suffering was for two days. The appellant in this case did not offer evidence on the time of suffering and there is nothing in the evidence upon which this court could deduce the length of time. Indeed, the evidence of Chief Inspector Ndegwa suggests that the death was instantaneous. It is my finding therefore that the trial magistrate did not act on a misdirection in failing to award damages under that head.

For loss of dependancy, Counsel for the appellant again quoted extensively from the decision of Mativo J, in **David Kahuruka Gitau Vs. Nancy Ann Wathithu Gitau & Another [2016] eKLR** where the principles for assessing such damages are restated. In that case Mativo J, cited with approval the case of **Mensah Vs. Amakom Sawmill [1962] 1 GLR, 373** where Apaloo, J (as he then was) also cited the judgement of Lord Wright in **Davis Vs. Powell Daffryn Associated Collieries Limited [1942] 1 ALLER, 657**. The said rule, as pointed out by Mativo J, was admirably summarized in **Charlesworth on Negligence (3rd Edition) PP 560, 561 paragraph 909** as follows: -

“Method of calculating damages: When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation. ' The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such pan of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependants and the probable duration of the continuance of the deceased's assistance to the dependants during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependants in consequence of the death.” (Emphasis added)

In this case the appellant produced a letter from Masimba Secondary School (exB P.9) as evidence that the deceased worked in the school as an Accounts Clerk. That letter did not however state the amount of money he was earning so whereas the fact that he was gainfully employed was proved on a balance of probabilities his salary was not proved. This case is different from the case of **David Kajogi M’Mugaa Vs. Francis Muthoni [2012] eKLR**. There the plaintiff did not produce documentary proof of what her husband did for a living. In the **Checkers Trading Limited** case cited by the Advocate for the appellant, the issue there was that the appellant did not produce evidence to rebut the appellant’s case. That issue does not arise in this case as the respondent did not dispute that the deceased indeed was an Accounts Clerk. What was not proved is that he earned Kshs. 60,000/=. In **David Kajogi M’Mugaa Vs. Francis Muthoni [2012] eKLR** the Court used the minimum wage to assess damages for loss of dependency. That is now the accepted method of determining the earnings of the deceased where there is no evidence adduced. It is the same principle applied by the trial magistrate in this case and there was no error

in doing so.

The deceased was in an ascertained occupation (Accounts Clerk) in a school. Unlike one who is self-employed he was certain to retire at the age of sixty (60) years. As he was 58 years old at the time of death the probable duration of his earning capacity derived from his employment was only two years. The appellant was gainfully employed with a gross salary of Kshs. 40,000/= and only one child depended on them. I am satisfied that the multiplier adopted by the court was reasonable. The damages awarded are based on the evidence adduced and I find no reason to interfere. Accordingly, this appeal is dismissed but as the respondent did not file any submissions there shall be no order for costs. It is so ordered.

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

E. N. MAINA

JUDGE