



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 21 OF 2016

1. NATHAN OYORI NYANG'A.....1ST APPELLANT

2. KAITALEL MATHEW.....2ND APPELLANT

=VRS=

MARY OBEGI OMBAGA & JOSEPH GETUKA MOGAKA

[Both Suing as Legal Representatives and Administrators of the

Estate of LINUS OMBAGA MOGAKA (Deceased)].....RESPONDENTS

(Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – PM

dated and delivered on the 2nd day of August 2016 in the original Keroka

Principal Magistrate's Court Civil Case No. 151 of 2012)

JUDGEMENT

1. The respondents sued the appellants for compensation (damages) under the Law Reform Act and the Fatal Accidents Act following the death of Linus Ombaga Mogaka, deceased in an accident that involved the deceased, a motor cycle Registration No. KMCM 250C and a matatu KAX 820G belonging to the 1st appellant but which was being driven by the 2nd appellant.

2. After hearing evidence and submissions from both sides the trial magistrate found the appellants wholly liable and awarded the respondents damages as follows: -

- Special damages – Kshs. 54,700/=
- Pain and suffering – Kshs. 50,000/=
- Loss of expectation of life – Kshs. 100,000/=
- Loss of dependency – Kshs. 1,266,650/=

Total – Kshs. 1,471,260/=

3. From the grounds of appeal in the memorandum of appeal and the submissions of Counsel for the appellant this appeal is against the quantum of damages. In the judgement the trial magistrate noted that liability was determined in PMCC – Keroka 150 of 2012 which was the lead/test suit. The grounds of appeal are: -

“1. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 54,700/= as special damages that were not proved to the required standards in Law.

2. That the learned trial magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 1,266,560/= as loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.

3. That the learned trial magistrate erred in law and fact by awarding sum of Kshs. 100,000/= for loss of expectation of life and not deducting the same to avoid double compensation as required by law.

4. That the learned trial Magistrate erred in law and fact in failing to consider the appellants' submissions and legal authorities relied upon in support to the Defence thereof.

5. That the learned trial Magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

6. That the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong."

4. In the event that I am wrong about the issue of liability and the test suit it was my finding after reconsidering the evidence in the lower court that the appellant was to blame for this accident. Contrary to the appellants' submissions in the lower court, the respondents called an eye witness at the trial. That witness, Machini Oigoro (Pw3) testified that the accident occurred close to his home. He testified that the deceased was on the side of the road when the appellant's motor vehicle which had lost control after hitting a cyclist hit the deceased. In cross examination the witness reiterated that the accident occurred off the road. The death certificate produced as exhibit 3 indicates that the deceased died on the same day. The appellants did not adduce any evidence to rebut the evidence of this witness and it is uncontroverted. I noted from the proceedings that the appellants took out third party proceedings against the owner of the motor cycle. That notwithstanding it is my finding that as between the respondents and the appellants the appellants were to blame for the accident.

5. On the damages, it is my finding that whereas the assessment thereof was based on the evidence and was not inordinately excessive as to amount to a wrong estimate of the damage, the trial magistrate applied a wrong principle in arriving at the award for loss of dependency. The award of Kshs. 50,000/= for pain and suffering for a person who was hit and tossed into the air before falling to the ground is not unreasonable although he died at the scene. This court finds no justification to interfere.

6. The award of Kshs. 100,000/= for loss of expectation of life is a conventional award and is what courts have awarded over the years.

7. The special damages awarded comprised of what was strictly proved as well as reasonable expenses. In **Premier Dairy Ltd Vs. Amarjit Singh Sagoo & Another [2013] eKLR** the Judges of Appeal stated: -

"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 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 learned judge took what was a practical and pragmatic approach."

8. For loss of dependency the trial magistrate correctly observed that the earnings of the deceased were not proved and adopted the then minimum wage of Kshs. 7,916/= for a general labourer in the General Amendment Order 2012. However, the trial magistrate should have adopted the minimum wage in the General Amendment Order 2010 which came into effect on 1st May 2010 the same being the one in force at the time relevant to this suit. That order provided for a minimum wage of Kshs. 3,597/= for all other areas except the cities and municipalities which is what the trial court should have applied as the multiplicand. This court finds no misdirection in the multiplier and dependency ratio and hereby calculates damages for loss of dependency as follows: -

$$3,597 \times 20 \times 12 \times 2/3 = \text{Kshs. } 575,520/=.$$

9. On the argument that the trial magistrate ignored the submissions of the appellant but relied on those of the appellants that should not vitiate the judgement as it is for exactly that reason that this appeal is before me.

10. In the upshot judgement for the respondent against the appellants is now entered for: -

(a) Liability – 100%.

(b) Damages

(i) Special damages – Kshs. 54,700/=

(ii) Pain and suffering – Kshs. 50,000/=

(iii) Loss of expectation of life – Kshs. 100,000/=

(iv) Loss of dependency – Kshs. 575,520/=

Total – Kshs. 780,220/=

(v) Interest at court rates on the specials from date of filing suit and that on the general damages from date of judgement in the court below.

11. The award for loss of dependency shall be distributed equally between the spouse and the children of the deceased (each to get an equal share) with the shares of the children under the age of eighteen (18) being deposited in an interest earning account in the joint names of the respondents and the Deputy Registrar of this Court until those children attain 18 years. Leave to make withdrawals shall be made only with the leave of the court.

12. The appellants shall get half the costs of this appeal having succeeded only partially.

It is so ordered.

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

E. N. MAINA

JUDGE