



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 127 OF 2014

BENARD OSUMO.....APPELLANT

VERSUS

SAMSON OMAYO ATUYA,

JOHN KEBASO OMAYO (Suing as the legal representatives

of the Estate of GEORGE BUNDI OMAYO.....RESPONDENTS

(An appeal from the Judgement and Decree of Hon. Njoroge (Principal Magistrate) in Kisii CMCC No. 159 of 2014 delivered on 11th day of November, 2014)

JUDGMENT

1. The deceased was lawfully walking along the verge of Nyamira-Senta road near Jubilee Plaza when the defendant's driver negligently drove the defendant's motor vehicle Reg. Mark KBN 914V knocking down the deceased and as a consequence the deceased sustained fatal injuries. After his death, his estate and dependants filed suit claiming damages under the *Fatal Accident Act (Chapter 32 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)*. After hearing the matter, the trial magistrate found the appellant fully liable and made the following award in favour of the respondents;

Pain and Suffering	Kshs.	20,000.00
Loss of Expectation of life	Kshs.	100,000.00
Loss of Dependency		
(Kshs. 35,329 X 20 X 12 X 2/3)	Kshs.	5,652,640.00
TOTAL	Kshs.	5,772,640.00

2. The appellant appealed against liability and assessment of damages. The grounds for the appeal can be summarised as follows; that the trial magistrate erred in holding that the Plaintiff proved their case on liability thereby holding the appellant 80% liable; that the award on damages for loss of expectation of life was manifestly excessive; the trial magistrate erred in law and in fact by awarding damages for lost years based on a salary of Kshs 35,329/-; and that the dependency ratio of 2/3 was unsupported by evidence.

3. This being the first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusions bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

4. To prove his case the Respondent called three witnesses before the trial court, James Gitonga (Pw1), John Kebaso (Pw2) and Kevin Omayo (Pw3); while the appellant called two witnesses, David Cornelius Nyangira (Dw1) and Jairus Ogwara Agatasa (Dw2).

5. According to the plaint, the deceased was 35 years old and at the time of his death he was working as a teacher earning Kshs. 41,802/- per month to support his father, widow and his four siblings. Pw2 was the deceased's brother, he testified that the deceased left behind a wife, one child, his father and siblings whom he took care of. He testified that funeral expenses were Kshs 120,000/-. Pw3 testified that on 14/11/2011 he was with the deceased and they headed to Nyamira Township. He testified that he saw a lorry KBN 914V coming at a high speed, the vehicle appeared to have lost control thereby veering off its lane knocking the deceased. Thereafter motor vehicle stopped 25-35 metres away. Pw1 testified that he is attached to Nyamira traffic base. He told court that the road traffic accident reported on 24/11/2011 involved motor vehicle KBN 914V Mitsubishi lorry and the deceased who died on the spot. The Investigating officer was P.C. Bashir. The

file was recommended for public inquest and closed on 14/09/2012. He further testified that the vehicle is owned by the Defendant.

6. Dw1 was the Executive Assistant working in Nyamira Law Courts. He testified that the deceased was to blame for the road traffic accident and produced the inquest file in which proceedings had been closed. Dw2 recalled that on 14/11/2011 around 6:00 p.m. he saw someone come out of a bar and crossed the road. Dw2 passed him but then heard him under the motor vehicle. He gave evidence that he realized the motor vehicle ran over him, he stopped but unfortunately the deceased was already dead.

7. The appellant submitted that according to Pw1 the deceased was to blame for the accident which was also confirmed by evidence of Dw1 who produced the inquest file. They submitted that the trial court erred in finding the appellant 80% liable while the inquest found the deceased 100% liable. On quantum the appellant submitted that there was no evidence that the deceased was survived by the child and the plaintiff made no mention of a child. The appellant further submitted that the suit was not instituted by the widow and the father who are the dependants. They proposed that an amount of Kshs 70,000/- would have been sufficient for loss of expectation of life quoting the case of **HCCC No. 133 of 2008 VKM vs Alfonzo Muteria & Tharaka**. They also submitted that for loss of dependency of life the net pay was Kshs 26,595.10 and the deceased having died at 35 a multiplier of 15 would have been proper.

8. The respondents submitted that the trial court's finding on liability was proper and relied on the case of **Jina Venzi & Another v John Mwaka Amisi & 2 Others HCCA No. 589 of 2010**. It was their submissions that the 2/3 ratio, the net salary of Kshs 35,329/- and the multiplier of 20 years were properly applied.

9. I will start with the issue on liability. It was the appellant's submission that the inquest found the respondent to be 100% liable and thus liability of 80% was excessive. In the case of **Charles Munyeki Kimiti vs Joel Mwenda & 3 Others [2010] Eklr** Lenaola J rendered himself as follows:-

“It is clear that the Resident Magistrate upon inquiry absolved them from blame. It does not however follow that the inquest exonerates the respondents from tort. If negligence is established...just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence...”

10. Similarly in the case of **Chemwolo & Another v Kubende [1986] KLR 492** at page 498, the Court of Appeal stated the issue thus:-

“With respect, it was not for the learned judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well-known that both parties to an accident might have driven carelessly and each could be convicted to careless driving for their respective types of carelessness.....It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of proceedings in the traffic case.”

11. In determining liability the above two decisions demonstrate that the trial court was therefore not bound by the finding of the inquest. The trial court looked at the evidence that was presented before the court before coming up to the conclusion that liability be shared at 80:20 in favour of the respondent. The trial court observed thus;

“The court apprehends that an inquest was held and the driver abstracted from criminal negligence, the plaintiffs have admitted that the decision was arrived at after conducted investigations that were hospitalized and frustrated the family, by not allowing witnesses to record their statements. In the alternative the sketch plan show that the body rested in the middle of the tarmac and as I stated earlier the driver was recite as to show the accident occurred, the driver in his testimony said that the deceased threw himself into the road. The court's view is that Dw2 had ample opportunity to see and avoid the accident 50 metres away.”

12. I am constrained to agree with the observation of the trial magistrate. Dw2 had seen the deceased crossing the road while he was 50 metres away, his testimony that he had knocked the deceased thereafter only fortifies the trial court's finding on liability. Pw3 also testified that the lorry did not stop immediately, it stopped 25-35 meters from the scene which was an indication that the driver was driving at a high speed. I therefore affirm the trial court's decision that the driver was driving dangerously and the appellant is therefore 80% liable for the accident.

13. I now turn to the issue of quantum of damages. In determining whether an award of damages is too low the court is guided by holding in the case of **Butt v Khan [1981] KLR 349**;

“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”

14. The trial magistrate made an award for loss of expectation of life at Kshs 100,000/- which the appellant has argued is excessive. There is no dispute that the estate of the deceased is entitled to damages for loss of expectation of life under the **Law Reform Act**. The plaintiff in their submission before the lower court proposed an amount of Kshs 100,000/- while relying in the case of **Angelina Sila Mula vs. Mothers Favourite Ltd MSA HCCC No. 99 of 2011**. The Defendant proposed Kshs 70,000/- relying on the case of **Yussuf Abdalla v Mombasa Liners Limited (2004) eKLR**. In **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR** Emukule J. held that;

“In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Shs 100,000/= currently... In this case, the conventional figure for loss of expectation of life is Shs 100,000/= and I award the said.”

I find and hold that the decision by the trial court under the heading loss of expectation of life was reasonable.

15. The manner of assessment of damages under the *Fatal Accidents Act* was succinctly put by Ringera J., in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)* where he stated as follows;

“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. Each 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’ purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum arrived at must then be discounted to allow the legitimate consideration such as the fact that the award being received is a lump sum and would if wisely invested yield returns of an income in nature”.[Emphasis mine]

16. In the *Beatrice Wangui Thairu* case (supra) the principle that was established is that the court should consider the net earnings of the deceased. In this case the deceased’s pay slip for October 2011 showed total earning was 41,802/- and Kshs 26,595.10 was the net pay for that month. I agree with the appellant’s argument that the deceased did not have any children as dependants as the same was never pleaded and neither was any evidence produced to support the respondent’s claim in that regard. However Pw2 testified under oath that the deceased had other dependants being his father and widow which I find as sufficient evidence on dependants. This was not challenged on cross examination. Although the Pw2 also testified that the deceased had siblings whom he took care of, **Section 4 (a)** of the *Fatal Accidents Act* provides that every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. It therefore follows that the deceased siblings were therefore not dependants.

17. Assessment of the dependency ratio is a question of fact, the reasoning behind the adoption of the ratio of two thirds (2/3) was not given by the trial court. However since the respondents adduced evidence that the deceased had dependants, his father and widow, I do not find that the dependency ratio of 2/3 warrants any interference by this court as the deceased would have been expected to use most of his salary to maintain his family.

18. I now turn to the issue of the multiplier, the trial court adopted a multiplier of 20. In *Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR*, the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life if the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. I am of the view that the deceased died at the age of 35 years, assuming he would have worked until retirement age of 60 years then he had 25 years to work, given the fact that he was physically and mentally health at the time of his death. I therefore find that a multiplier of 20 years applied by the Trial Magistrate was reasonable taking into account the vicissitudes of life.

19. In light of the above finding, I allow the appeal to the extent that I set aside the award for loss of dependency under the *Fatal Accidents Act* and substitute the same with the following award of Kshs. 4,255,200/- made up as follows Kshs. 26,595/- x2/3 X 20 X 12 subject to contribution by the respondent.

20. The respondent shall pay costs assessed at Kshs. 25,000/-. The amount awarded shall accrue interest at court rates from the date of judgment.

Dated, signed and delivered at Kisii this 10th day of April 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Odero h/b Mr. Wahungu For the Appellant

Miss Koko h/b Mr. Nyangosi For the Respondent

Rael Court clerk