



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 104 OF 2018

MARY CHEPKEMOI CHERUIYOT.....1ST APPELLANT

JOSEPH KIPNGENO CHERUIYOT

(Suing as the administrators ad litem of the estate of

KIPKOECH NG'ENOH aka DENNIS-(Deceased)....2ND APPELLANT

-VERSUS-

ANDREW MWANGI.....1ST RESPONDENT

JAMES MUNG'ORA KIHUHA.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable G. M'masi

(Mrs.) (Senior Principal Magistrate) delivered on 2nd February, 2018

in CMCC NO. 6944 OF 2016)

JUDGMENT

1. By way of a plaint dated 5th July, 2016 the appellants filed a suit as administrators ad litem and on behalf of the estate of Dennis Kipkoech Ngenoh AKA Dennis(*the deceased*) against the respondents, seeking both general and special damages plus costs and interest thereon.

2. The appellants pleaded that while travelling along Narok-Bomet Road on or about the 9th of November, 2014 as a fare paying passenger in the 2nd respondent's motor vehicle registration number KBG 729A being driven by the 1st respondent, the deceased was involved in a road accident and sustained fatal injuries.

3. It was also pleaded that the accident resulted from negligence on the part of the 1st respondent.

4. Subsequently, the appellants requested for interlocutory judgment against the respondents for failure to enter appearance within the stipulated timelines. The matter then proceeded for formal proof with the 1st appellant testifying as the sole witness. Submissions were thereafter filed and judgment entered on 2nd February, 2018 in the following manner:

a) *Liability-100%*

b) *General damages for pain and suffering-10,000/=*

c) *General damages for loss of dependency-Kshs.1,800,000/=*

d) *General damages for loss of expectation of life-Kshs.100,000/=*

Total-Kshs.1,910,000/=

5. The appellants have now lodged an appeal against the said judgment vide a memorandum of appeal dated 7th February, 2018 premised on the following grounds:

(i) THAT the learned trial magistrate erred in making an award for loss of dependency which had been abandoned.

(ii) THAT the learned trial magistrate erred in failing to make an award for loss to the deceased's estate.

(iii) THAT the learned trial magistrate confused the principle of multiplier and multiplicand thus arriving at erroneous awards.

(iv) THAT the learned trial magistrate erred by using a salary of Kshs.15,000/= for a university student without laying any basis.

(v) THAT the learned trial magistrate erred in making awards which were too low and/or erroneous.

(vi) THAT the learned trial magistrate erred in her application of the law on the issue of damages.

6. The appeal was disposed of through written submissions filed by the appellants on 18th February, 2019. I have carefully considered the same hand in hand with the grounds of appeal. I have also re-evaluated the evidence and submissions offered before the trial court in addition to revisiting the trial court's judgment.

7. It is clear that the grounds of appeal touch solely on the award on quantum of damages. In the premises, I will begin with the *first* ground. It is the appellants' submission that notwithstanding the fact that they had abandoned the claim for loss of dependency, the trial court went ahead to make an award under this head.

8. Turning to the filed plaint, I confirm that the appellants sought for damages under the heads of 'pain and suffering,' 'loss of expectation of life', 'lost years' and 'loss of dependency' respectively. In their submissions before the trial court, the appellants urged the said court not to make an award for loss of dependency. Ultimately, the trial court awarded the sum of Kshs.1,800,000/= under the head of loss of dependency.

9. In view of the foregoing, I am persuaded that the learned trial magistrate had no basis for making an award under the head of loss of dependency when the same had been abandoned as portrayed in the final submissions. Resultantly, such award was wrongly made.

10. In any event and as was rightly articulated by the appellants, to award both the damages for lost years sought and loss of dependency would amount to double compensation. In buttressing this point, the appellants cited the following holding in case of **Richard Matheka Musyoka & another v Susan Aoko & another (suing as the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR:**

"A claim under the Fatal Accidents Act is made by the dependants of the deceased who claim for loss of the support by the deceased during his lifetime. Although the principles of assessment are similar, the court cannot make an award for lost years and loss of dependency as the benefits would ultimately devolve to the same parties under both Acts and this would amount to double compensation."

11. This paves the way for me to address the *second, third* and *fourth* grounds of appeal together. In relation thereto, the appellants have contended that the approach taken by the learned trial magistrate in awarding damages for loss of dependency in fact applies to an award for lost years. They further contended that the multiplicand of Kshs.15,000/= applied by the trial court was not only without basis but could not have possibly applied to a university student/graduate pursuing a course similar to that pursued by the deceased. Various authorities were cited in this respect in urging this court to adopt an approach similar to those used by the respective courts.

12. I have already established hereinabove that the learned trial magistrate wrongly awarded damages for loss of dependency as opposed to awarding the damages for lost years sought by the appellants. It therefore follows that an award ought to have been made for lost years under the Law Reform Act.

13. In actual fact, the court in **Richard Matheka Musyoka & another** (supra) had the following to say on the subject:

"Damages for lost years under the Law Reform Act are recoverable for the estate of the deceased where the deceased died before he could institute an action. Under section 2(5) of the Act such damages are recoverable for the benefit of the estate and are in addition to any rights conferred on dependants of the deceased by the Fatal Accidents Act."

14. That notwithstanding, it is noteworthy that the two (2) approaches of making awards are similar and I will thus proceed to re-evaluate the evidence before the trial court hand in hand with the computation made by the said court.

15. On damages for lost years, the appellants proposed before the trial court a multiplier of 32 years and a multiplicand of Kshs.40,000/= as well as a ratio of 1/3 totaling the sum of Kshs.5,120,000/=. However, the learned trial magistrate in her decision deemed the proposed multiplicand to be quite high and opted for one of Kshs.15,000/= as well as a multiplier of 30 years and a 1/3 ratio on dependency, thereby arriving at an award of Kshs.1,800,000/=.

16. Going by the plaint and evidence adduced, the deceased was at the time of his death aged 21 years and a student at Garissa University College pursuing a Bachelor of Arts Degree in Economics. The evidence also shows that the deceased was in his 2nd year of study when he met his untimely death.

17. Whereas the deceased had no disclosed income at the time of his death, there is no doubt he would have moved on to find employment and as a result earn an income. PW 1 who also happens to be the 1st appellant herein testified that the deceased had hoped to join the civil service upon graduating and pursue a career in economics.

18. Further to the above, the said witness relied on a Revised Scheme of Service for Economists/Staticians issued in September, 2006 forming part of the appellants' list and bundle of documents and constituting the record of appeal. Going by the same and with reference to *page 47* specifically of the said record, I find that were the deceased to have been employed by the civil service, he would likely have joined at the entry level of an Economist II (Job Group "K"). Similarly, a Salary Review effective from 1st July, 2017 found on *page 90* of the record of appeal indicates that persons under Job Group "K" at the time earning KShs.41,590/= would have their salaries increased to KShs.44,750/=.

19. Suffice it to say that the appellants urged the trial court to adopt a multiplicand of KShs.40,000/= which I find reasonable in the circumstances. As such, I disagree with the trial magistrate's finding that the proposed sum was on the higher side. Moreover, the multiplicand of KShs.15,000/= applied by the said magistrate was not explained or supported.

20. As concerns the multiplier, the appellants are not disputing the 30 years adopted by the trial court. The ratio of 1/3 applied by the learned trial magistrate was similarly not challenged.

21. In view of the foregoing, I will apply the multiplicand of KShs.40,000/= per year and the multiplier of 30 years as well as the ratio of 1/3 thus: $KShs.40,000/= \times 12 \times 30 \times 1/3 = KShs.4,800,000/=$. I thus make an award of **KShs.4,800,000/=** for lost years. In so finding, I drew reliance from the approaches taken in *Ruth Wangechi Gichuhi v Andrew Mangeni Luande [2011] eKLR* and *Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] eKLR* both cited in the appellants' submissions and constituting comparable circumstances and computations as those in this matter.

22. I am now left with the *fifth* and *sixth* grounds of appeal. It is submitted by the appellant that the award of KShs.10,000/= as damages for pain and suffering was lower in comparison to comparable awards. In place, the appellants urge this court to award KShs.50,000/= for pain and suffering. Concerning damages for loss of expectation of life, the appellants submit that the same now ranges between KShs.100,000/= and KShs.200,000/=.

23. In their written submissions before the trial court, the appellants proposed the sum of KShs.80,000/= and KShs.200,000/= as damages for pain and suffering, and loss of expectation of life respectively. In the end, the trial court awarded KShs.10,000/= and KShs.100,000/= in that order.

24. Courts are called upon to apply certain specific principles in determining whether or not to interfere with awards made. Such principles were adequately laid down in the renowned *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* case thus:

a) whether the trial court took into account an irrelevant factor, or

b) whether the trial court left out of account a relevant factor, or

c) whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

25. With regards to damages for pain and suffering, I am guided by the evidence adduced by PW 1 who is the 1st appellant herein that following the accident, the deceased was rushed to hospital after having sustained serious injuries and later died to show that the deceased suffered pain and anguish prior to his death, thereby warranting the award for pain and suffering.

26. In *Ruth Wangechi Gichuhi* (supra) the court awarded KShs.25,000/= for pain and suffering where the deceased died in hospital on the date of the accident. On the other hand, this court in *Yh Wholesalers Ltd & another* (supra) upheld an award of KShs.50,000/= under this head.

27. It is my view that there is no way of telling exactly how long the deceased bore with his injuries before his demise as no indication was given by way of evidence. Nonetheless, the mere fact that he did not die instantly can reasonably be taken to mean that he experienced great pain for whatever duration. My reading of the impugned judgment leads me to conclude that the learned trial magistrate did not take this into account in making her award under this head.

28. On the flip side, the awards proposed by the appellants in their submissions appear to be on the higher side.

29. In the premises, I am inclined to interfere with the trial court's award of KShs.10,000/= under this head and substitute it with a reasonable award of **KShs.30,000/=**.

30. Regarding the award for loss of expectation of life, I find no reason to interfere with the same since it falls well within the range of comparable awards. In any case, whereas the court in *Ruth Wangechi Gichuhi* (supra) opted to award KShs.150,000/=, it acknowledged that KShs.100,000/= is a conventional figure applied under this head and this particular case is of a merely persuasive nature. I therefore see no reason to interfere with the award already in place.

31. The upshot is that the appeal succeeds in part. Consequently, the learned trial magistrate's award on quantum is hereby set aside and substituted with the award made hereinbelow:

a) Pain and suffering	Kshs.30,000/=
b) Loss of expectation of life	Kshs.100,000/=
c) Lost years	Kshs.4,800,000/=
Total	Kshs.4,930,000/=

There shall be no order on costs.

Dated, signed and delivered at NAIROBI this 20TH day of JUNE, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellants

.....for the Respondents