



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 311 OF 2017

FRANCIS GWEHONA CHANGALWA

JOSEPHINE KADEDE MUSERA(Suing as the.....APPELLANTS

legal representatives & administrators

of the estate of **SOSPETER LIVUMBAZI GWEHONA – Deceased)**

VERSUS

HOLIDAY CARS & TOURS LIMITED.....1ST RESPONDENT

JUSTUS NJUGUNA WAMBUGU.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 24th May, 2017 by Hon. P. Muholi (Senior Resident Magistrate) Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 6220 of 2014).

JUDGMENT

1. The Appellant, Joseph Francis Gwehona Changalwa and Josephine Kadede Musera filed suit as the legal representatives of the estate of the deceased, Sospeter Livumbazi Gwehona. The deceased was fatally injured in a road traffic accident which occurred on 25th November, 2011. The Appellant blamed the accident on the negligence of the Respondents.

2. The claim was denied and proceeded to hearing. The trial magistrate entered judgment in favour of the Appellants for a total of Ksh.4,062,076.00 on a 100% liability basis as follows:

Pain and suffering Ksh.50,000/=

Loss of expectation of life Ksh.100,000/=

Loss of dependency Ksh.3,755,376/=

Loss of consortium Nil

Special damages Ksh.156,700/=

TOTAL Ksh.4,062,076/=

3. The Appellants were dissatisfied with the said judgment on the quantum of damages and appealed to this court on the following grounds:

“1. That the learned magistrate erred in law and in fact in finding that the applicable multiplicand was Ksh.17,386 hence arriving at a wrong quantum of general damages under the head loss of dependency.

2. That the learned magistrate erred in law and in fact in failing to find that, based on the evidence presented, the applicable multiplicand would have been Ksh.32,113/=.

3. That the learned magistrate erred in law and in fact in awarding inordinately low quantum of Ksh.50,000/= damages under the head of pain and suffering.

4. That the learned magistrate erred in law and in fact in failing to award general damages under the head of loss of consortium.

5. That the learned magistrate erred in law and in fact by failing to exercise his discretion judiciously in awarding damages and failed to apply settled legal principles thereby arriving at an inordinately low quantum respecting general damages.”

4. The appeal was disposed of through written submissions which I have considered.

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”

6. The 31 year old widow to the deceased, Josephine Musera (PW1), testified that the deceased was her husband and that they had two children age 4 and 6 years. Her further evidence was that the deceased was the family’s sole bread winner. That the deceased was a workshop manager at Champion Radiators in Nairobi and used to earn Ksh.30,000/= to Ksh.38,000/= per month. Her further evidence was that following her husband’s death she relocated to their rural home in Kitale where she started farming. She testified that she has also suffered loss of consortium.

7. The evidence of PW1 was not controverted by any other evidence. The Respondent did not call any witness. However, the traffic case proceedings and other documents were produced as exhibits by the consent of the parties.

8. On whether to interfere with the award of general damages, this court is guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**: where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

9. The trial magistrate awarded Ksh.50,000/= for pain and suffering. The Appellant has submitted for an award of Ksh.100,000/= on this head while the Respondent submitted for Ksh.5,000/=.

10. The evidence on record has established that the deceased died on the same day of the accident. There is evidence from the Traffic case proceedings that reflect that the deceased was rushed from the scene of the accident to the hospital but passed away before treatment. I find the award of Ksh.50,000/= for pain and suffering reasonable taking into account other comparable cases.

11. On dependency, the Appellants counsel had no quarrel with the trial magistrate’s application of 2/3 dependency ratio and a multiplier of 27 years. The Appellant is dissatisfied with the multiplicand of Ksh.17,386/= and submitted that the proper multiplicand is Ksh.32,113/=. The Respondents’ counsel submitted on a multiplicand of Ksh.11,520/= and a dependency ratio of 1/3.

12. Dependency is a question of fact to be established by way of evidence. In this regard, as stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR**:

“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years ... As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions”

13. The application of 2/3 dependency ratio is reasonable in this case. The evidence by the widow established that the deceased was the sole provider and that they lived in Nairobi with two small children.

14. Four payslips for the month of August, September, October and November 2011 were produced as exhibits. These payslips reflect that the deceased was paid at the rate Ksh.640 per day. The payslips for the months of August, September and October reflects that the deceased worked for 23-26 days per month. The deceased passed away during the month of November, 2011 and had not worked for the full month.

15. The trial magistrate used the payslip for the months of October, 2011 to arrive at the earnings of the deceased. The deceased passed away

in the month of November, 2011. The deceased had worked for the full month of October. The basic salary kept fluctuating every month as the calculations were based at the rate of Ksh.640/= per day. For example, the basic pay in the month of August, 2011 was Ksh.16,640/= while in the month of September it was Ksh.14,720/=. The basic pay of Ksh.16,000/= relied on by the trial magistrate is therefore fair in the circumstances.

16. The trial magistrate applied the basic salary of Ksh.16,000/= plus house allowance of Ksh.5,000/= to arrive at the figure of Ksh.21,000/=monthly earnings less the statutory deductions which came to Ksh.17,386/=. It has been submitted on behalf of the Appellants that the trial magistrate did not take into account the payments made for working overtime. However, there is no evidence that overtime was going to remain a constant feature in the payslip over the years. The same applies to the lateness deductions reflected in the payslip. Ksh.17,386/= is therefore a reasonable reflection of the earnings of the deceased, especially taking into account the multiplier of 27 years applied.

17. The widow testified that she has suffered loss of consortium. Although there was no evidence whether she intended to remarry, remarriage could not have been immediate. I allow an award of Ksh.100,000/= on this head.

18. With the foregoing, the total award works out as follows:

- a) Pain and suffering Ksh.50,000/=
- b) Loss of expectation of life Ksh.100,000/=
- c) Loss of dependency Ksh.3,755,376/=
- d) Special damages Ksh.156,700/=
- e) Loss of consortium Ksh.100,000/=

TOTAL Ksh.4,162,076/=

21. The upshot is that the appeal succeeds partially to the extent aforesaid. The judgment of the Lower Court is hereby set aside and substituted with a judgment in favour of the Appellants against the Respondents jointly and severally for the sum of Ksh.4,162,076/= interest and costs. The appeal having been partially successful, each party to bear own costs.

Dated, signed and delivered at Nairobi this 30th day of Oct., 2019

B. THURANIRA JADEN

JUDGE