



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 59 OF 2018

MUMBI NGUMBI KASAMU (Suing as the legal

Representative of the Estate of

BONIFACE MULINGE MBITHE (DECEASED)..... APPELLANT

-VERSUS-

MUTUA MULAA

JOSEPH MBOTI MUTUA.....- RESPONDENTS

(Being an Appeal from the judgment of Hon. Wambugu (R.M) delivered on 3/5/2018 in Civil Suit No. 434 of 2016 at Kithimani Law Courts)

-BETWEEN-

MUMBI NGUMBI KASAMU (Suing as the legal

Representative of the Estate of

BONIFACE MULINGE MBITHE (DECEASED)..... PLAINTIFF

-VERSUS-

MUTUA MULAA

JOSEPH MBOTI MUTUA.....DEFENDANTS

JUDGEMENT

1. The Appellant herein is legal representatives of the estate of **Boniface Mulinge Mbithe** who died on the 7th December, 2015 following injuries received in a road traffic accident the same day involving the 1st Respondent's motor vehicle registration no. KCD 756J. The suit was in respect of a claim for compensation under both the *Fatal Accidents Act* and the *Law Reform Act* in which the Respondent claimed General Damages, Special Damages, Costs and Interests.

2. This appeal is restricted to the award under loss of dependency. The only evidence regarding that award was from PW1 and PW2.

3. According to PW1, **Mumbi Ngumbi**, she was the grandmother to the deceased herein who was involved in a road traffic accident on 7th December, 2015 while lawfully travelling in the said motor vehicle. At the time of his death, according to her statement which she adopted, the deceased was 28 years working as a casual labourer earning Kshs 10,000.00 per month. It was her evidence that she spent Kshs 20,000.00 in burial expenses. She testified that she was the administrator of the estate of the deceased and that she obtained letters of administration which she produced. She also the post mortem report confirming the fact of the deceased's death.

4. In cross-examination, she stated that the deceased was 23 years old and was a painter. She stated that she did not know what the deceased was earning but that he used to give her money since his parents were deceased and he was left under her care. The deceased was however unmarried and had no child.

5. PW2, **Stephen Mwangangi Makau**, testified that he was a painter and he knew the deceased with whom he was working. On the day of the accident he was with the deceased who was assisting him to complete his work and they were going to work on a house which they were painting. It was his evidence that they used to be paid per day and for 5 years they used to work together whenever PW2 secured a contract. It was his evidence that they used to earn Kshs 1,000.00 per day.

6. At the close of the plaintiff's case the defence also closed its case without calling any evidence.

7. In her judgement, the learned trial magistrate found that since the deceased died on the spot, the pain was minimal. Based on **Lucy Njoki Chege vs. James Macharia Kungu T/A March Transporters & Another [2005] ECLR**, she awarded the Plaintiff Kshs 20,000.00 for pain and suffering. As for the loss of expectation of life she based her award of Kshs 100,000.00 on the case of **Alexander Okinda Anagwe vs. Reuben Muriuki Kahuha & Others [2015] eKLR**. Regarding the award for loss of dependency, based on section 4(1) of the Fatal Accidents Act as read with the case of **Kenya Power and Lighting Company Limited vs. Monica Otiang Oluoch [2016] eKLR**, the learned trial magistrate found that the Plaintiff herein, the deceased's grandmother is not a dependant under the said Act and did not make any award under the said head. She however awarded Kshs 550/= being proved special damages and based on the decision of the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR**, **Alice O. Olukwe vs Akamba Public Road Services Ltd & 3 Others [2013] eKLR** and **Paul Momanyi Soire Nathan vs. Caroline Moraa Akumba & Another [2015] eKLR**, she awarded the plaintiff Kshs 20,000.00 under this head. In total the plaintiff was awarded Kshs 140,550.00.

8. This appeal is based on the following grounds:

1) **THAT** the learned Magistrate erred in law and in fact in failing to make an award under loss of dependency.

2) **THAT** the Learned Magistrate erred in law and in fact by failing to consider the evidence tendered on dependency by the Appellant.

3) **THAT** the Learned Magistrate erred in law and in fact by considering irrelevant factors consequently proceeding on the wrong principle of law.

4) **THAT** the Learned Magistrate erred in law and in fact by failing to consider the Appellants evidence and submissions.

9. In support of the appeal, the appellant relied on the case of **Florence Mumbua Ndoor & Francis Kioko (Suing as the administrators of the Estate of the late Alfred Safari) –vs- Ezra Korir Kipngeno & Another (2017) eKLR**.

10. It was therefore submitted that the learned trial magistrate ought to have read section 4 together with section 2 of the **Fatal Accident Act**. It was submitted that the Appellant herein has proved that, due to the accident, the estate of the deceased has been put to loss and damage and ought to be compensated for the same. The plaintiff in her submissions under the sub-heading of loss of dependency submitted that the deceased was a casual labourer specialized in doing painting jobs. She submitted that the court do adopt the minimum wage for a painter which is Kshs: 10,000/=. He was 23 years old at the time of his untimely demise and a proposal of a multiplier of 35 years was made based on the case of **Alexander Okinda Anagwe –vs- Reuben Muriuki Kahuha & Others (2015) eKLR**, where a multiplier of 32 years was adopted for a deceased who was 25 years old. The appellant also relied on **Florence Mumbua Ndoor & Francis Kioko (Suing as the administrators of the Estate of the late Alfred Safari) –VS- Ezra Korir Kipngeno & Another (2017) eKLR** in which the decision of **Ringera J.** (as he then was) in **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** was cited.

11. In was the appellant's view that **this would then work out as follows:-**

$$10,000 \times 12 \times 35 \times \frac{1}{2} = 2,100,000/=.$$

12. The Court was urged to find this appeal merited and allow the same as prayed by awarding the appellant loss of dependency as proposed.

13. The Respondent did not file the submissions.

Determinations

14. In this appeal, the appellant is only challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

15. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

16. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

17. As regards the claim for loss of dependency, section 4(1) of the *Fatal Accidents Act* provides as hereunder:

“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...”

18. However, section 2 of the said Act provides that:

(1) In this Act, except where the context otherwise requires—

“Child” means a son, daughter, grandson, granddaughter, stepson or stepdaughter;

“Parent” means a father, mother, grandfather, grandmother, stepfather or stepmother.

(2) For the purposes of this section a person shall be deemed to be the child or parent of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption; and accordingly in deducing any relationship which under the provisions of this section is included within the meaning of the expressions “child” and “parent”, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters...”

19. It is therefore clear that parent includes a grandmother and to that extent I agree with the decision of Nyamweya, J in Florence Mumbua Ndoe & Francis Kioko (Suing as the administrators of the Estate of the late Alfred Safari) –vs- Ezra Korir Kipngeno & Another (2017) eKLR. The two provisions of the law must therefore be read together and had the learned trial magistrate done that she would have come to the conclusion that for the purposes of the *Fatal Accidents Act* the Appellant herein was a parent of the deceased and she ought not to have dismissed the claim for loss of dependency.

20. The deceased was according to the plaintiff’s statement aged 25 years old. He was doing casual work of painting. Although it was claimed that he was earning Kshs 1,000.00 per day, there was no evidence to that effect. According to the *Regulation of Wages (General) (Amendment) Order, 2015* the appellant would fall under the category of general workers whose minimum wage would be Kshs. 10,954.70. This also is in tandem with the finding of the Court in Philip Mutua vs. Veronica Mule Mutiso [2013] eKLR that where income is not proved, the income of an unskilled worker ought to apply. Since the Respondent was the deceased’s grandmother, and she would not have been expected to depend on the deceased wholly and for a very long time, I would apply a dependency ratio of 1/3rd with multiplicand of 20 years.

21. Accordingly, the loss of dependency would be:

$$10,954.70 \times 20 \times \frac{1}{3} \times 12 = 876,376.00$$

22. Accordingly, the appeal succeeds and the order disallowing the award of loss of dependency is hereby set aside and substituted with an award of Kshs 876,376.00. As there was no appeal against the other awards, the same will remain as per the judgement of the trial court.

23. The costs of this appeal are awarded to the appellant.

24. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 19th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kavita for Mr Mulu for the Appellant

CA Geoffrey