



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 15 OF 2018

1. STEPHEN ONSERIO MONDA.....1ST APPELLANT

2. ATANDI FRED MACHOKA.....2ND APPELLANT

-VRS-

FRANCIS MOSE MOTURI {Suing as Legal Administration of Estate of

JOYCE NYARESO MOSE (Deceased)}.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka

dated and delivered on the 31st day of July 2018 in the original Keroka

Principal Magistrate's Court Civil Case No. 127of 2017}

JUDGEMENT

The respondent herein brought a suit against the appellants in connection with the death of Joyce Nyareso Mose following a motor accident involving the appellants' motor vehicle Registration No. KBJ 279E and a motor cycle Registration No. KMCH 610Z.

On 3rd July 2018 the parties through their Advocates recorded a consent judgement on liability in the ration 75:25% and left the assessment of damages to the court. By a judgement delivered on 31st July 2018 the trial Magistrate awarded the respondent damages as follows: -

Ø Pain & suffering – Kshs. 200,000/=

Ø Loss of expectation of life – Kshs. 100,000/=

Ø Loss of dependency – Kshs. 3,000,000/=

Ø Special damages – Kshs. 161,270/=

Ø Costs of the suit

Ø Interest.

Being aggrieved by the quantum of damages, the appellants preferred this appeal. The grounds for the appeal are that: -

“1. The learned magistrate erred in law in making a finding of damages against the defendants.

2. The learned magistrate erred in law and fact in holding that the defendants was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

3. The learned magistrate erred in law and fact by apportioning dependency ratio at 2/3 instead of 1/3.

4. The learned magistrate erred in law and fact in awarding unreasonable Loss of Dependency of Kshs. 3,000,000/= by taking a multiplicand of 25 years without taking into consideration the vagaries of life.
5. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs. 3,000,000/= by taking an income of Kshs. 15,000/= without any tangible proof of the same or pleading the same.
6. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 161,270/= without concrete documentary evidence.
7. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion of condemning the defendant to damages of Kshs. 2,595,953/= without any tangible proof of the same.
8. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
9. The learned magistrate erred in law and fact in failing to appreciate as follows: -
 - (i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.
10. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiffs against the defendant in spite of the plaintiff's miserable failure to establish her case more especially on quantum.
11. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances."

The appeal was canvassed by way of written submissions. It is clear from the submissions of Counsel for the appellants that the appeal is only against the award under the Fatal Accidents Act (Loss of dependency), which the appellants contend was inordinately excessive. Counsel submitted that the multiplicand of Kshs. 25,000/= was erroneous given that there were no documents to prove that the deceased was earning Kshs. 15,000/= in Qatar. Counsel submitted that the trial Magistrate should have adopted the then minimum wage of Kshs. 8,000/=. Counsel however had no contest on the multiplier and dependency ratio applied and urged this court to assess damages under that head as follows: -

$$8000 \times 12 \times 25 \times 2/3 = 1,600,000/=$$

Counsel further urged this court to offset the award for loss of expectation of life from that for loss of dependency and relied on the case of **Charles Omwenga Ongiri & another v Daniel Muniko [2017] eKLR** in support of his submission. The ground of appeal touching on special damages was abandoned and was not canvassed in the submissions.

The appeal was however vehemently opposed with Counsel for the respondent arguing that a letter was produced evidencing the deceased's salary at 200 dollars (approximately Kshs. 16,000/= then) per month and this court was therefore urged to dismiss the appeal with costs to the appellants.

As noted earlier parties recorded a consent on liability in the ratio 75:25% and this court is only asked to look into the issue of the quantum of damages more specifically for loss of dependency. I have considered the submissions filed by Counsel for both sides. It is clear that the only issue in contention is the multiplicand. Counsel for the appellants made it clear in their submissions that the **"multiplier was reasonable in view of the fact that life expectancy has been greatly reduced due to the incidences of poverty, road accidents....."** On the dependency ratio it was conceded that as **"deceased had a child who depended on her 2/3 was correctly applied by the lower court."**

For the respondent it was argued that the trial court properly adopted a multiplicand of Kshs. 15,000/= based on evidence that those were the deceased wages per month. Counsel submitted that an employment letter to that effect was produced at the hearing. That however is not borne by the judgement. Clearly the trial Magistrate did not make reference to an employment letter evidencing the deceased's salary and seems to have plucked the figure of Kshs. 15,000/= from the air "so to speak." In his judgement, the trial Magistrate stated: -

".....Considering that deceased died aged 25 years and considering the nature of work she would have worked for 25 years more taking into account the visitudes of life and that being so an income of Kshs. 15,000/= would be sufficient....."

I have myself looked at the documents produced to prove the deceased worked in Qatar (Exhibit 10 (A) and 10 (B)) as well as the other attachments thereto. Exhibit 10B is an Employment Agreement between Domestic workers and Sponsor and it clearly discloses a salary of 200\$ per month. However, the same lacks the name of the employer and sponsor and is executed by only one party perhaps explaining why the trial Magistrate did not deem it fit to rely on the same. It is the practise that where there is no evidence of earnings then the courts adopt the minimum wage which is what the trial Magistrate should have done. In the circumstances I agree with Counsel for the respondent that damages for loss of dependency ought to have been calculated as follows: -

$$8000 \times 25 \times 12 \times \frac{2}{3} = 1,600,000/=$$

The ground of appeal touching on special damages was not canvassed and I take it that it was abandoned.

As for deduction of the award for loss of expectation of life, the Court of Appeal recently stated in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased)) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** that:

“[20] This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

I am obligated to heed that exhortation and will not say more.

Accordingly, this appeal succeeds to the extent that the award for loss of dependency of Kshs. 3,000,000/= is set aside and substituted with one for **Kshs. 1,600,000/=**. The said sum is to be distributed between the dependants as follows: -

(i) MM – Kshs. 1,000,000/=

(ii) Francis Moses Moturi – Kshs. 300,000/=

(iii) Tabitha Mose Moturi – Kshs. 300,000/=

The sum awarded to the child MM shall be invested in an interest earning account in a reputable bank in the joint names of the Administrator of the estate of the deceased and the Executive Officer of Keroka Principal Magistrate’s Court until she attains the age of eighteen (18) years. The award under the Law Reform Act shall go to the estate of the deceased to be distributed in accordance with the Law of Succession. As for the costs, the appellants shall get only half the costs of this appeal. It is so ordered.

It is so ordered.

Signed, dated and delivered in Nyamira this 19th day of December 2019.

E. N. MAINA

JUDGE