



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCA 253 OF 2013

KENSILVER EXPRESS LTD.....1ST APPELLANT

PETE NDEGWE.....2ND APPELLANT

VS

RAEL TIRINDI & JACKLINE E MARK

(Suing as Legal Administrators of the

Estate of Boniface Mwenda – Deceased).....RESPONDENT

JUDGMENT

Kensilver Express Ltd and Peter Ndegwa filed this appeal against the determination of D.W.Mburu in Meru CMCC No. 116 of 2012 in which the trial court entered judgement in favour of the Respondents for Kshs 721,080 in damages arising out of a fatal Road Accident wherein Boniface Mwenda, son of Rael Tirindi and brother of Jackline Kinya Mark died on 17th December 2010.

From the trial courts judgment it appears the parties entered into a consent where liability was apportioned at 80% to 20% in favour of the Respondents. The Respondent called one witness the 1st Respondent herein to testify. The defence didn't call any witnesses, but submissions were filed by both parties. The appeal is brought on the grounds that:-

- The Learned trial erred in law in failing to take it into account the award under Law and Reform Act while awarding damages under the Fatal Accidents Act.
- That the learned trial magistrate erred in Law in adopting a multiplicand of Kshs. 8,000/= without a basis to support the same
- That the judgement of the learned trial magistrate is against the law and weight of evidence on record.

In the submissions in the lower court the appellant proposed Kshs 7000/= for pain and suffering basing their argument on the authority of Floice Adma Onami vs Kezia Muthoni & 2 others MSA HCC 301 of 2002 where Kshs 5000/= was awarded for loss of expectation of life the appellant proposed Kshs, 80,000/= in the Lower court and relied on the authority of Chacha vs Richard Arap Koech Nairobi HCC 1863 of 2001 where Kshs 70,000/= was awarded.

For lost years it was proposed that a monthly sum of Kshs. 5000/= be applied as multiplicand and 20 years be applied as multiplier. Under the Fatal Accident Act the appellant had argued that no damages are awardable as there was no proof of income or any other corroborative evidence to prove income had been tendered. It was also argued that if any award is made under this heading it should be discounted in favour of the Heading under lost years herein above.

The Respondents is the Lower court proposed Kshs 130,000/= for loss of expectation of Life Kshs 50,000/= for pain and suffering. Kshs 800,000/= for loss of dependency using a multiplier of 25 years multiplicand of Kshs 8,000/=

The court made an award of:

1. Pain and suffering – Ksh. 20,000/=
2. Loss of expectation of Life Ksh.120,000

3. Lost years Ksh. 704,000

4. Special Damages – Ksh. 57,550/=

Less 20% Kshs. 180,270

In the appeal the appellant submitted that the trial magistrate had no basis to support monthly income of Kshs 8,000/= as no law or evidence had been placed before the court to show that the general wage was Kshs. 8,000/.

The appellant proposed Kshs 5,000/= as multiplicand and 22 years as multiplier and a dependency ratio of 1/3.

The appellants counsel relied on the decision of **David Kajogi M'Mgaa vs Francis Muthoni [2012] eKLR**. It was also argued that the trial court should have awarded a global sum instead of engaging itself in speculative and imaginary arithmetic calculations. The global sum proposed by the appellant is Kshs 400,000 for loss of dependency.

The authorities relied upon in this respect are:-

i. Sammy Kipruto Rop & Another vs Francis Cheruiyot [2016] eKLR

ii. P1 vs ZNA Roses Ltd [2015]eKLR

iii. M'Rarama M'Nthieri [2015]eKLR

The appellant argued further that the trial court should have discounted the award under Law Reform Act from the final award to avoid double compensation and that failure to discount was an error of law and principle in assessment of damages. In that regard the authority of **David Kajogi M'Mugaa vs Francis Muthomi [2012] eKLR** and **Sammy Kipruto Rop** as well as **Marwanga, Jeffern vs Jackton Ochieng [2015] eKLR** were relied upon.

The Respondents submissions were to the effect that grounds of appeal lacked any iota of merit as the trial magistrate took into account both awards under Law Reform Act and Fatal Accidents Act and particularly S. 2(5) of Law Reform Act which provides

“The right conferred by this part for the benefit of the estates of the deceased person shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accident Act or the Carriage by Air Act 1932 of the U.K.

It was argued that taking into account an award under one heard does not automatically mean deducting any award from the total figure unless the figure is colossal. It was submitted that the court should consider the plaintiffs expectation of the deceased help which was lost.

On the multiplicand the Respondent's counsel argued that lack of payslip and bank statements was not the only way of proving earnings as was held in the case of **Jacob Ayiga Mariya & Another vs Simeon Obayo [2005] eKLR**. It was argued that the appellants proposal of Kshs 5000/= as multiplicand was also based on any known principle and amounts to guess work. The Respondents counsel urged that appeal be dismissed with costs.

In considering whether appeal has merits this court is obliged to consider whether the trial magistrate applied the wrong principles of the law in assessing damages payable to the estate of the deceased or whether the amount awarded is so inordinately low or so high that it must be a wholly erroneous estimate of the damages.

In determining these issues the court is guided by the law that as an appellate court I should be cautious to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law that is to say, it took into account irrelevant factor.

The authority of **Kanga vs Manyoka [1961] EA 705, 709 and 7013** is instructive as far as the above principle is concerned in **Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR 5** it was held:

“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”

Whether the trial magistrate proceeded on the wrong principles to award damages this court wishes to say that both global sum and the multiplier method are just but methods of assessing damages and choice of one depends on the fact of each case as was held in the case of **Kwanzia vs Ngalali Mutua & Another**.

In considering the award for general damages the deceased was 20 years at the time of his death. Following road accident on 17th December 2010 and in the view of this court he was a young adult capable of working and earning the minimum wages and provided for. It is not disputed that he had obtained a B+ in KCSE and was looking forward to join the university. It was therefore possible to estimate approximate income and the trial magistrate did that by awarding lowest wages provided for by the law.

If i had presided over the disputed and would have been convinced that the deceased could make Kshs. 30,000/= in Miraa business

considering that this is cash crop in Meru County and it is a matter of public knowledge that it fetches fairly high prices. However, the consideration to be made is whether the amount awarded is so inordinately high or low. That is must be a wholly erroneous estimate of the damages. I do find that the award is average and it would not be prudent to unsettle this award by the trial court.

The deceased was an adult and his abilities could easily be ascertained as held in **KBL vs Saro [1991] Mombasa Civil Appeal No. 441 of [1990] eKLR.**

On damages for loss of expectation of life and pain and suffering that lower court failed to take into account the award under law. Reform Act form final award and from final award so as to avoid double compensation to the Respondents this court makes reference to the holding of the **Court of Appeal at Nyeri C.A No. 22 of 2014 –Hellen Waruguru Waweru vs Kiarie Shoe stores Ltd** where it was held:-

“.....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 estate are the same and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under 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 issue of duplication does not arise.”

This position supports the Respondents argument as provided for under S. 295) of the Law Reform Act. The decision of the trial court is upheld in the circumstances and the appeal is dismissed with costs.

HON A.ONG’INJO

JUDGE

Ruling delivered, dated and signed in court this 22nd Day of February 2018.

In the Presence:-

Appellant:M/s Muthiga & Kariuki for Appellant, Mr Kariuki M – Present.

Respondent:-Mr Gikunda Advocate for Respondent

HON A.ONG’INJO

JUDGE

Mr Gikunda Advocate

We pray that decretal sums deposited in Consolidated bank Meru Branch be released to the Respondents Advocate.

Mr Kariuki

I pray for copies of the judgement

Decretal sums held at Consolidated Bank Meru Branch in Meru C.C. No. 116 of 2012 to be released to Respondents counsel.

Copies of judgment herein to be supplied to appellants counsel at their costs.

HON A.ONG’INJO

JUDGE