REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 132 OF 2008

PRISCILLA MWATHIMBA.....APPELLANT

-VS-

SIMON KAIBUNGA.....1ST RESPONDENT

EMILIO NJERU.....2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the judgment of W.K Korir (Principal Magistrate) as he then was in ***Meru CMCC No. 18 of 2006***, in which the Learned Trial Magistrate awarded the appellant general damages of KShs.232,000/= arising from a road traffic accident that occurred on 31st May 2005, in which the deceased was fatally injured. Aggrieved by that award, the Appellant has now appealed to this court.

2. In her Memorandum of Appeal dated 19th April 2011, the appellant raised the following grounds:-

(a) ***the trial magistrate erred in law and fact in not awarding special damages while the same was pleaded and proved to the required standard;***

(b) ***the trial magistrate award in general damages (all headings) was inordinately low in all the circumstances of the case; and***

(c) ***the entire judgment was unfair in all circumstances of the case.***

3. When the appeal came up for hearing on 30th May, 2017, directions were made that the same be determined by way of written submissions. The appellant filed submissions but the respondent did not. It was submitted for the appellant that, failure to award special damages was unfair since a total sum of KShs.176,000/= was used for the preparation of burial for which 22 receipts were produced as exhibits to prove the expense. That the appellant had in cross examination stated that the money was given to her as a gift for losing her husband by the funeral committee and it was her choice to use it for the preparation of the burial. It was further submitted that failure to award any amount under special damages would mean no expenses were incurred yet the deceased was buried and expenses incurred. Consequently, the appellant urged the court to allow the award for special damages.

4. With regard to loss dependency, it was submitted that the deceased met his death at the age of 58 years and that being a businessman and farmer, he used to earn Kshs 30,000/= per month. That in the circumstances the deceased would have lived up to the age of 80 years. That he had a wife and 6 children of which he paid fees for two. It was therefore urged that the court should adopt a ratio of 2/3 relying on the case of ***Wairimu Mwangi & Another vs Joseph Wambue Kamau (2006) Eklr*** and compute the loss of dependency as,:22 (multiplier) x 12 (months in a year) x30,000 (multiplicand) x2/3 (ratio). Ms. Kiome for the appellant therefore urged that the decision of the trial court was erroneous and should be interfered with.

5. I have carefully considered the record and the Submissions of the appellant. This being a first appeal, the court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. See ***Selle vs. Associated Motor Boat Co. [1968] EA 123*** and ***Kiruga vs. Kiruga & Another [1988] KLR 348***.

6. This Appeal is on the issue of damages only liability having been agreed at 20; 80 in favour of the appellant in the lower court. The appellant who was the only witness in this case. She testified that the deceased was her husband and they had six children. He was a business man at Karama and also engaged in farming. That he used to make aboutKShs.30,000/= per month and used to pay school fees for two of his children apart from assisting in her upkeep. In cross examination, she remained firm that her husband had a shop at Karama but that she had nothing to show that he used to make KShs.30,000/= per month. She produced a trade licence to prove the existence of the said business. Her evidence remained firm even in cross-examination.

7. The general rule is that an appellate court should be slow to interfere with the discretion of the trial court in the award of damages unless the trial court is shown to have acted on wrong principles of law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

8. In ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A. M. M. Lubia & Another (1982-88) 1 KAR 777*** it was stated:-

> ***"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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (See Ilango – vs. Mayoka (1961) EA 705,709-713)."***

9. In the instant case, the appellant has taken issue with the award of Kshs.180,000/= as damages for loss of dependency. In awarding the said sum, the trial court stated:-

> ***"The deceased was a retired worker aged 56 years. His wife says he was earning KShs. 30,000/= from a shop he was operating at Karama market. She (PW1) produced a trade licence as exhibit. [PW1] told the court the deceased was selling household goods. She however produced nothing to show he was earning KShs.30,000/= per month from the business. Since he was in business, I find earning of KShs.5,000/= per month reasonable. He must have been using half of his amount to support his family. We do not know how long the deceased would have lived; a multiplier of 6 years would not be bad in this case. The plaintiff therefore gets KShs.2500x12x6 =180,000."***

10. On the issue of multiplier, the Court of Appeal in the case of ***Board of Governors of Kangubiri Girls High School & Another vs. Jane Wanjiku Muriithi & Another [2014] eKLR*** adopted the decision of the Court of Appeal in ***Cornelia Eliane Wamba vs. Shreeji Enterprises Ltd. & Others H.C.C.C No. 754 of 2005*** wherein it was held that:-

> ***"This court has given due consideration to the aforeset out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles:-***
>
> ***(a) The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.***
>
> ***(b) It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.***
>
> ***(c) The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.***
>
> ***(d) Death through natural causes and departure for greener pastures elsewhere is also a factor."***

11. In the instant case it was not in dispute that the deceased was a retired worker aged 56 years. The appellant contended that the deceased used to earn KShs.30,000/= per month.However, this was not supported by any evidence and the trial court found that KShs.5,000/= would be a reasonable sum as the deceased was a businessman.

12. While the appellant did not produce evidence of earnings of KShs.30,000/= per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of KShs.5000/= as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that thedeceased had a wife and six children, two of whom he was paying school fees. In all probability can KShs.5,000/= per month be sufficient to support such a large family cater for school fees, the personal needs of the deceased and continue to sustain a business? Can both a shop and farming be producing only Kshs.5000/= per month? This court finds that it is unreasonably low to sustain such a family. Further, to hold that he would spend a whole half on himself and only leave the other half ½ to the family is but a misdirection.

13. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural forks compensation for reason that there are no proper records of income. In the present case, there was prove of existence a business and farming activities. There was also uncontroverted testimony of the widow that the husband used to make about KShs.30,000/= per month.

14. In view of the foregoing, I hold the view that award of KShs. 5000/= was so inordinately low so as to amount to an erroneous estimate of damages taking into account that the deceased had a wife and six children who totally relied on him. He had a business and was a flourishing farmer.

15. Further, there is nothing to show that the deceased would not have been earning the said sum of KShs.30,000/= or any amount near that. In the premises I find that a monthly earnings of KShs.10,000/= submitted by Counsel to be reasonable.

16. Similarly, it was not in dispute that the deceased was a retired businessman aged 56 years old and as such, there was no cap on retirement

age since he could work for as long as hewished. In ***Nairobi Civil Appeal No. 142 Of 2003 Loise Wanjiku Kagunda vs. Julius Gachau Mwangi*** the Court of Appeal held as follows:-

> ***"Regarding the multiplier, the deceased was 77 years old. The trial judge reckoned that the maximum active working age as 80 years and thus applied a multiplier of 3 years. There is no misdirection in so finding."***

Thus the Court of Appeal did not disturb a finding that a businessman aged 77 years could live to 80 years.

17. In ***Kisumu H.C.C.A No. 42 Of 2010; Coast Bus (Msa) Ltd vs. David Mandu Blembwa*** the court held that:-

> ***"the deceased was aged 56 years old … the deceased had reached retirement age at the time of the accident. However, I shall sustain a multiplier of ten (10) years."***

18. In the present case considering that the deceased was self employed and the uncertainties of life and applying the principles enunciated in the case of ***Cornelia Eliane Wamba-vs. Shreeji Enterprises Ltd. & Others-(supra),*** I find a multiplier of 10 years to be reasonable. The Court of Appeal in the case of ***Loise Wanjiku Kagunda (supra)*** found that a businessman can live up to 80 years. I will therefore compute loss of dependency thus; 10,000X12X10X2/3 = KShs. 800,000/=.

19. With regard to special damages, it is trite law that the same must be strictly proved and pleaded. The appellant particularized her special damages at KShs.176,000/=. She was however able to prove by way of receipts an expenditure of KShs.131,000/= for the funeral. The trial court was of the view that since the said sum of KShs.131,000/=was given to her by the funeral committee, awarding the said amount would be unjust enrichment out of the death of her husband.

20. With greatest respect, the trial court failed to consider that the widow testified that the said sum was a gift to her. It is not the funeral committee that incurred the expense. To my mind, it will not be unjust enrichment to award her the amount she spent for the funeral of her husband. Failure to award the said sum was misdirection. I will award the same.

21. The upshot of the foregoing is that the appellant's appeal succeeds to the extent foretasted and I accordingly enter Judgment for the appellant as follows:-

(a)	Pain and suffering -	KShs.10,000/=
(b)	Loss of Expectation of life -	KSh.100,000/=
(c)	Loss of dependency -	KShs.800,000/=
(d)	Special Damages -	KShs.131,000/=
	TOTAL:	KShs.1,041,000/=
	Less 20% contribution:	KShs.208,200/=
	TOTAL AWARD:	KShs.832,800/=

22. The appellant will also have the costs of the appeal.

It is so ordered.

DATED and DELIVERED at Meru this 22nd day of February, 2018.

A. MABEYA

JUDGE