



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL NO. 25 OF 2014**

**JAMAL ALEEM.....APPELLANT**

**VERSUS**

**BENARD RUTTO (Suing as the Administrator and/or**

**Personal Representative of the Estate of**

**BERNARD KIPRONO LANGAT (DECEASED).....RESPONDENT**

*(Appeal from the judgment and decree in Kericho CMCC No. 104 of 2014 (Hon. SMS Soita, CM)*

**JUDGMENT**

1. The appellant in this matter was the defendant in Kericho CMCC No. 104 of 2013. The suit was a claim by the respondent following a road traffic accident in which the deceased, on behalf of whose estate the suit was brought, suffered fatal injuries. The suit was brought under the provisions of the **Law Reform Act** and the **Fatal Accidents Act**. A consent on liability was entered in the ratio of 85:15 in favour of the plaintiff/respondent on 22<sup>nd</sup> January 2014.

2. In his judgment dated 6<sup>th</sup> August 2014, the trial court made an award in damages as follows:

**i) Pain and suffering-Kshs 17,000**

**ii) Loss of Life=Kshs 127,500**

**iii) Loss of dependency- Kshs 2, 040,000**

**iv) Funeral expenses-Kshs 40,000**

**v) Special damages-Kshs 10, 980**

**Total-Kshs 2,235,480**

3. Dissatisfied with the decision on the quantum of damages, the appellant filed the present appeal in which he raises the following grounds:

***1. The learned trial magistrate erred in fact and in law in arriving at the decision against the weight of the evidence on record.***

***2. The learned trial magistrate's award of damages of Kshs. 2,235,480 (Two Million Two Hundred and Thirty Five Thousand Four Hundred and Eighty) was excessively and grossly erroneous in light of evidence tendered.***

***3. The learned trial magistrate failed to consider and/or ignored the defence submissions on record and hence came to a wrong conclusion in assessing damages.***

***4. The Learned Magistrate in overall handling of the assessment of damages was punitive to the appellant rather than compensatory to the respondent contrary to public policy in such cases.***

4. This being a first appeal, the court is under a duty to assess the evidence before the trial court and reach its own conclusion-see **Selle vs**

Associated Motor Boat Company [1968] E.A 123 where it was stated:

*“An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this court is not bound necessary to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.*

5. In the present case, the appellant challenges the quantum of damages awarded to the respondent by the trial court. In the case of **Butt -vs- Khan Civil Appeal No. 40 of 1997**, the court stated that:

*“An 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.”* See also **Kemfro Africa Ltd and Another vs A.M. Lubia & Another (1982-1988)**

6. In view of the fact that there was a consent recorded on the question of liability, there is not much dispute about the facts. The evidence before the trial court was that a road traffic accident occurred on 8<sup>th</sup> January 2012 at Cherote junction along the Kericho – Kisumu road involving two pedestrians, the deceased, Bernard Kiprono Langat and one Stephen Koros, also deceased, and motor vehicle registration number KBA 470 Q, a Toyota Prado, owned by the appellant. The respondent called one witness who produced a police abstract, burial permit and death certificate in respect of the deceased. He also produced a search in respect of the motor vehicle.

7. The plaintiff’s evidence was that the deceased was a watchman at Sugutek Primary School, was aged 27, and was married with 3 children. This is confirmed by the documents produced in evidence. The defendant (the appellant in this case) did not call any witnesses.

8. In his decision, the trial court used a multiplicand of Kshs 12,000, noting that the deceased was earning a salary of Kshs 12,600 as a watchman. He used a multiplier of 25 years, again noting that the deceased was aged 27 at the time of his death. He used a two thirds ratio in view of the fact that the deceased was married and had three children, and arrived at damages for loss of dependency of Kshs 2,400,000. In view of the consent on liability at 85:15 in favour of the plaintiff/respondent, this amount was reduced by 15% to Kshs 2,040,000. He also made an award for loss of expectation of life of Kshs 150,000 which was reduced to Kshs 127,000, pain and suffering of Kshs 20,000 reduced to Kshs 17,000, special damages of Kshs 10980 and funeral expenses of Kshs 40,000.

9. Directions in this matter were taken that the appeal be disposed of by way of written submissions. Both parties filed written submissions which I have duly considered in rendering this judgment.

#### **Issues for Determination**

10. While the appellant does not raise this point in his grounds of appeal as a specific issue, he submits that the trial court should have deducted the amount of Kshs 150,000 made for loss of expectation of life from the final award made to the respondent. The second issue is whether the award made to the respondent under the head of loss of dependency was excessive in the circumstances of this case and should therefore be interfered with by this court.

#### **Whether the award in respect of loss of expectation of life should be deducted from the final award**

11. On the first issue, the appellant submits that an award made for loss of expectation of life should be deducted from the total sum awarded. His contention is that the dependants of the deceased estate should not obtain double compensation. He relies on the decision in **Joseph Wachira and Another vs Mohammed Hassan 2006 eKLR**. In this decision, the High Court had held that the amount awarded in respect of the claim for loss of expectation of life should be deducted from the final award in damages.

12. However, in its decision in **Agnes Bosibori Ogega vs Tea Research Foundation & Another Nakuru Court of Appeal Civil Appeal No. 226 of 2007** the Court of Appeal, after citing the provisions of section 2(5) of the Law Reform Act and section 4(1) and (2) of the Fatal Accidents Act, and in reliance on the decision of the Court of Appeal (Chesoni, Lakha and Omolo, JJA) in **Nyanza Sugar Co. Limited vs James Martin Matoke Kisumu CA No. 91 of 1997 (U.R)** stated as follows:

*“The trial court should assess and make an award of damages under both sets of law as each is intended for a distinct head: under the Law Reform Act for the benefit of the estate of the deceased as compensation for loss of expectation of life and under the Fatal Accident Act for benefit of the dependants of the deceased for loss of support from the deceased. We agree that in most cases the beneficiaries of both may be the same and that is why there is a requirement that awards under one Act take into account the award under the other to avoid over compensation or unjust enrichment. But such taking into account does not mean not making the award at all.”*

13. In allowing the appeal, the Court of Appeal observed that:

*“..we are in agreement with the appellant that the learned trial judge erred firstly when he failed to make a determination of an award under the Law Reform Act for the benefit of the deceased’s estate; and secondly for holding that had he made such a determination then the resulting figure awarded would have been reduced mathematically from the sum awarded under the Fatal Accidents Act.”*

14. The law is thus that an award for loss of expectation of life should be made in circumstances such as were before the trial court, which was correctly done in this case, and that such an award should not be deducted from the final award in damages. Accordingly, I find no basis for interfering with the trial court's decision with respect to the award for loss of expectation of life.

**Whether the award of damages for loss of dependency is excessive in the circumstances**

15. The thrust of the appellant's case in this regard is that the award of Kshs 2,400,000 made to the respondent on the basis of a multiplier of 25 years is excessive and should be interfered with by this court. He submits that the deceased was a watchman, which a risky job was exposing him to challenges such as the weather at night, attacks from robbers and even mental breakdown. The appellant therefore argues that a multiplier of 15 years is sufficient in the circumstances.

16. The response from the respondent is that the trial court properly applied the principles applicable in the assessment of damages for loss of dependency. It is submitted on her behalf that while she had urged the trial court to use a multiplier of 33 years, the number of years remaining between the age of the deceased at the time of his death and the retirement age of 60 years, the trial court had taken 25 years as the multiplier. The respondent relied on the decision of Sitati J in **Jonnes Olumasayi and Anor suing as legal representatives of the estate of Michael Olumasayi vs Munial Koyedia and Anor Nairobi Civil Case No 1368 of 2006** in which the court used a multiplier of 25 years for a military officer who died at the age of 27 years.

17. The parties referred the court to the decision of Ringera J in **Beatrice Wangui Thairu vs Hon Ezekiel Barngetuny & Another Nairobi HCCC No 1638 of 1988** as quoted in **Transpares Kenya Limited & Another vs SMM (Suing on behalf of the estate of EMM deceased). Machakos HCCA No. 203 of 2013** where Ringera J (as he then was) stated:

*“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance, find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants”.*

18. In the present case, from the evidence presented before the trial court, the deceased died at the age of 27 years. He was employed as a watchman at Sugutek Primary School. While the appellant terms his engagement as a watchman as risky, there is nothing before this court, or anything presented before the trial court, as it should have been, that shows that watchman are predisposed to health problems, including mental problems, as a result of the nature of their work. The appellant argues that the trial court should have used a multiplier of 15 years. This would imply that the deceased would only work up to the age of 42 years. I am unable to see a basis for this dire expectation of life in respect of a person working as a watchman in Kenya that would deny him 18 years upto the statutory retirement age. Consequently, I am unable to find that the multiplier of 25 years applied by the trial court was unreasonable in the circumstances.

19. The appellant was also dissatisfied with the use of Kshs 12,000 as the multiplicand in this matter. He proposes a multiplicand of Kshs 7,000, which he submits was the salary paid to watchmen at the time of the deceased's death. It is also his argument that the trial court erred in taking the dependency ratio of 2/3, his submission being that this was not proved by the respondent.

20. I note from the record of the trial court that the letter of appointment produced by the respondent in evidence at the trial showed that the deceased was earning a salary of Kshs 12,600 per month. He was also engaged in other farming activities. The evidence in respect of the earnings of the deceased was not challenged.

21. From the evidence, the deceased was married and had a wife and 3 children. While the appellant now submits that the ratio of dependency was not proved, he has not provided a basis on which this court can find that the trial court erred in applying the ratio of two-thirds in arriving at the damages for loss of dependency. In the case of **Joseph Wachira and Another vs Mohammed Hassan** (supra) relied on by the appellant, Kimaru J reduced the dependency ratio to 1/2 in a case where the deceased was a bachelor and the court was not satisfied that he spent 2/3 of his income on his parents and siblings. In the present case, the deceased was married and had children. It was reasonable, in my view, for the trial court to find that he spent the bulk of his income on his family, to provide them with food, shelter, and the educational needs of the children. I therefore find no basis for interfering with the decision of the trial court on this score either.

22. In the circumstances, I am constrained to find that there is no merit in the present appeal. It is hereby dismissed with costs to the respondent.

**Dated Delivered and Signed at Kericho this 15<sup>th</sup> day of February 2018.**

**MUMBI NGUGI**

**JUDGE**