



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.78 OF 2017

BETWEEN

ANN KANJA KITHINJI (Suing as the Legal

Representative of the Estate of

PATRICK KOOME (Deceased).....1st APPELLANT

AND

JACOB KIRARI & JOSPHAT MWITI KIRARI.....RESPONDENTS

(AS CONSOLIDATED WITH MERU HCCA NO.79 and 80 OF 2017)

BETWEEN

PURITY KAURI.....2nd APPELLANT

JOHN BOSCO MWENDA (Suing as the Legal

Representative of the Estate of AGNES

KAJUJU KINYUA (Deceased).....3rd APPELLANT

AND

JACOB KIRARI & JOSPHAT MWITI KIRARI.....RESPONDENTS

(An appeal from the Judgment and Decree of the SNR. Principal

Magistrates Court Tigania (Hon. G. Sogomo SRM)

Dated 1st August, 2017 in PMCC No. 10 of 2014)

JUDGMENT

1. These appeals emanate from a road traffic accident that occurred on 16th September 2011, involving Patrick Koome (deceased) who was riding motor cycle registration number KMCL 276W and 2 pillion

passengers, Agnes Kajuju and Purity Kauri, and motor vehicle registration number KAZ 517Q, which was at the time being driven by the 1st respondent.

2. As a result of the said accident, Patrick Koome and Agnes Kajuju sustained fatal injuries while Purity Kauri sustained serious injuries. Ann Kanja Kithinji and John Bosco Mwenda (1st and 3rd Appellant) sued in their capacities as Legal Representatives of their respective estates while Purity Kauri sued in her personal capacity.

3. In their joint defence, the respondents denied the respective appellant's claims in total. They denied that they were the driver and owner of the subject motor vehicle or the occurrence of the accident. The particulars of negligence were also denied and the appellants put to strict proof. After trial, the trial court awarded the 1st Appellant Kshs. 600,000/ for loss of expectation of life and loss of dependency, Kshs. 1,000,000/= to the 2nd Appellant as damages for pain and suffering and Kshs. 150,000/- to the 3rd Appellant for pain and suffering and loss of expectation, respectively.

4. The Appellants were aggrieved by the said awards which provoked the instant appeals. The Respondents on the other had was aggrieved by the award made to the 2nd Appellant and preferred a cross appeal against her. The three appeals were consolidated by an order of this court made on 23rd January, 2018 with Appeal No. 78 of 2017, being the lead file. The appeals were canvassed by way of written submissions.

5. The appeals were on the issue of quantum only liability having been apportioned in the ratio of 70:30 in favour of the Appellants.

6. For the 1st Appellant, it was submitted that despite authorities relied on, the trial court did not consider them and the figure of Kshs. 500,000/= which the court called a global sum had no basis. That the court had a duty to decide whether to treat the deceased either as a farmer or a boda boda operator and that in any of these cases, the court had to resort to the minimum wages guidelines. In the circumstances, it was submitted that either way, the global sum of Kshs. 500,000/- awarded had no basis and was extremely low. The court was urged to re-assess general damages for lost years and award a sum of Kshs 3,047,552/= subject to 30% contribution. The case of **Charles Mageto & Anor v. Sospeter Ndungu Kamau CA No. 158 of 2011** was relied on.

7. For the Respondents, it was submitted that on loss of dependency, the trial court had a duty to treat the deceased as either a farmer or a boda boda operator and that it was for a litigant to adduce consistent evidence for the same to be reliable before court. That despite PW1 and 2 being close relatives of the deceased, they were not certain what the deceased did for a living. It was further submitted that where the amount of earning earned by a deceased is unsettled, the court adopts a lump sum instead of delving into estimating incomes. The cases of **Henry Omweri Oroo & Anor v. Samuel Mungia Kahiga & Anor [2016] eKLR** and **Monica Muthoni Mwanga v. Peterson Wanjohi & Anor [2004] eKLR** were relied on in support of those submissions.

8. With regard to the 2nd Appellant, it was submitted that in making the award, the trial court failed to comment on the degree of pain and suffering that the Appellant suffered or was likely to suffer and the degree of injury and the attendant loss of amenities. The Appellant contended that a sum of Kshs. 2,000,000/= would have been adequate compensation and relied on the cases of **Devna Pandit v. Kennedy Otieno Obara & Anor NBI HCCC No. 494 of 2011** and **Nickson Muthoka Mutami v. K.A.R.I Machakos CA No. 93 of 2012**. That on special damages, a claim of Kshs. 63,100/= had been proved as a whole and ought to have been awarded. On the Cross Appeal, the Appellant contended that the same had no merit and should be dismissed.

9. For the Respondents, it was submitted that in cases where injuries were sustained in a road traffic accident, the rule as to the award of general damages was that comparable injuries attract comparable awards. With regard to special damages, it was submitted that no amount was awardable as the same was only pleaded but not strictly proved. On the Cross Appeal, it was submitted that the trial court failed to

consider that comparable injuries attract comparable awards and as a result awarded the Appellant an inordinately high amount of Kshs 1,000,000/=. The cases of **Kinyanjui Wanyoike v. Jonathan Muturi Choga [2004] eKLR** and **Mulwa Musyoka v. Wadia Construction [2004] eKLR** were relied on in urging the court to reduce the award to KShs. 150,000/-.

10. With regard to the 3rd Appellant, it was submitted that the trial court misunderstood the issue of dependency in that in a civil suit, the person who can sue or be sued is a legal representative of the estate of the deceased. That this had been complied with when **HC. Succ. Cause No. no. 161 of 2013** was filed and wherein a Limited Grant issued to the Appellant with the consent of the family. Further, that the Appellant had stated in his pleadings that he was a legal representative of the deceased and that the claim was being brought for the benefit of the deceased's husband and children.

11. With regard to quantum, it was submitted that the deceased was a farmer who also engaged in the business of buying and selling cereals. Consequently, it was urged that the deceased be presumed to have been a general labourer whose minimum wage would be Kshs. 9,024/=. That since she was aged 36 years, she would have worked for 24 years until retirement working out the loss of dependency thus: $9,024 \times 24 \times \frac{12}{3} =$ Kshs 1,732,608/=.

12. For the Respondent, it was submitted that although the appellant was a legal representative of the deceased, he did not qualify as a dependant and thus the reason no award was made for loss of dependency and that the Appellant had not adduced any evidence to show that the deceased left behind any dependant. With regard to, special damages, it was submitted that the same was not awardable as the same was only pleaded but not strictly proved. The cases of **Henry Omweri Oloo (supra)** and **Monica Muthoni (supra)** were relied on in support of those propositions.

13. 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 v Associated Motor Boat Co. [1968] EA 123** and **Kiruga v Kiruga & Another [1988] KLR 348.**

15. On 11th October, 2016, the three suits in the lower court were consolidated. Further, liability was recorded by consent on 14th March, 2017 at 70/30% in favour of the appellants.

16. **PW1 Ann Kanja** testified that on the material day, she was at home when she learned that her husband, Patrick Koome Ndume, had died as a result of a road traffic accident. That she had 5 children with the deceased. That the deceased was a boda boda operator earning Kshs.300/- per day. She spent KShs.10,000/- securing letters of administration. She did not have either the birth certificates of the children or records to show that the deceased was earning Kshs. 300/- per day.

17. **PW2 was Jeremiah Muthuri M'Ibui.** He told the court that he was the father of the deceased. That the deceased was a boda boda operator/rider and farmer. In addition, he performed domestic chores. That the deceased died instantly at the scene of the accident.

18. **PW3 Purity Kauri Baario** told the court that she was a farmer. She narrated how the accident occurred and how she and Agness Kajuju Kinyua rushed to Miathene Sub-District Hospital. That Agnes died at the hospital while she was taken to Meru Level 5 Hospital where she was admitted for 40 days. That she was injured in the head, two metal plates were inserted into her left leg one of which was still there as at the time she testified and that she was on clutches for 2 years. That she was at the time of trial suffering from arthritis during cold seasons and was limping. She produced a medical report that set out the details of her injuries.

19. **PW4 was John Bosco Mwenda.** He held letters of administration in respect of the estate of the late Agness Kajuju Kinyua. That the deceased was his sister in law, a farmer and a cereals vendor at Kianjai. He did not know what her income was. That the deceased had a husband and two children. He confirmed that he had obtained a limited grant of letters of administration to institute the proceedings.

20. From the evidence on record, **PW1** told the court that the deceased was a boda boda rider while **PW2** stated that the deceased was both a rider and farmer. There was no contradiction in the testimonies of the two witnesses.

21. In *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR*, Ngaah J while quoting with approval the case of *Gammel versus Wilson (1981) 1 ALL ER 578* stated as follows:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

22. In *Gammel versus Wilson (1981) 1 ALL ER 578* Lord Scarman spoke of the assessment of damages in such circumstances and he stated at pg. 593, thus:-

“The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell’s case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a ‘conventional’ award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a ‘conventional’ award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell’s case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.

23. The same reasoning was adopted in the earlier decision in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR* where Nambuye J., as she then was, stated that:-

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion, that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

24. In the present case, **PW1** testified that the deceased was operating a motorcycle business earning Kshs.300/-. However, she offered no tangible evidence to prove that earning. Neither was **PW2** able to compute the deceased’s earnings from farming. It is for this reason that the trial court adopted a global award of Kshs 500,000/= as loss of dependency. In view of the fact that the deceased earnings could not be ascertained and going by the authorities cited above, I cannot fault the trial court for awarding a global award in the circumstances of this case.

25. The only question that this court would address itself is to whether the award of Kshs 500,000/= for

loss of dependency is in the circumstances so inordinately low or high to have been wholly an erroneous estimate of the damages.

26. 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 the 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. (See **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another (1982-88) 1 KAR 777**).

27. In **Bon Ton Ltd vs Beatrice Kanaga suing as Administrator of the estate of Richard Olembi Ochenga [2018]e KLR** a motor cycle rider was awarded Kshs. 800,000/=. In **Oyugi Judith and Anor vs Fredrick Odhiambo & 3 others [2014] e KLR**, similarly a motorcycle rider was awarded Kshs. 700,000/= as a global sum.

28. From the circumstances of this case, there was uncontroverted evidence that the deceased was married with 5 children and was 32 years and in the prime of his life when he met his death. He was both a motorcycle rider and a farmer though his income was unascertainable. Taking into account all the circumstances in this case, I find the sum of Kshs 500,000/= awarded by the trial court for loss of dependency to be low so as to amount to an erroneous estimate of damages. An award of Kshs. 800,000/= damages for loss of dependency would be adequate.

Civil Appeal No. 79 of 2017

29. It is not in dispute that the appellant sustained the following injuries: multiple scalp cuts, mild head injury, fracture mid shaft femur, massive blood loss and multiple cuts on the left hand and knee. The doctor was of the opinion that the fractures had healed but she still had an implant *in situ* which would be required to be removed after two years and that she would continue with physiotherapy. He however did not state how much this would cost. The trial court awarded the appellant Kshs. 1,000,000/= as damages for pain and suffering.

30. In **Omar Musa Hassan & Another –Vs- Rashid Salim & Another Nairobi High Court Civil Suit No.2391 Of 1995** the plaintiff was awarded Kshs.700,000/= for a commuted fracture of the right femur and several soft tissue injuries. In the case of **Mary Pamela Oyioma v Yess Holdings Limited NKR HCCC No. 186 of 2008**, the plaintiff sustained a comminuted fracture of the right femur; compound fracture of right tibia, fracture of left tibia; soft injuries to the right shoulder and multiple cut wounds over the whole body, the court awarded Kshs.900, 000/- in general damages. In the case of **Florence Njoki Mwangi vs Chege Mbitiru**, Civil Appeal No. 102 of 2011, the court awarded Kshs. 700,000/- general damages for fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

31. Considering the injuries sustained by the appellant, the time she spent in hospital (40 days) the fact that she is yet to undergo another procedure to remove the metal whose cost is unknown and further considering that the trial court did not refer to the injuries suffered but only proceeded to give the award, it is my view that the amount of Kshs 1,000,000/= awarded by the trial court is so inordinately low as to amount to an erroneous estimate of damages. An award of Kshs. 1,500,000/- would have been adequate which I accordingly award. The upshot of the foregoing is that the Respondents' Cross Appeal is without merit and the same is accordingly dismissed.

32. With regard to special damages, it is trite law that the same must not only be specifically pleaded, but the same must as well be proved. The Appellant contended that she had proved a total sum of Kshs 63,100/= being special damages. The Respondent on the other hand contended that the same was not awardable as it not strictly proved. The trial court refused to award the same having found that no receipts were shown to court. Nowhere in the record is there proof that the appellant produced any receipts for the specials incurred. I am therefore not persuaded that any specials were proved. That claim is accordingly rejected.

Civil Appeal No. 80 of 2017

33. There was uncontroverted evidence that the deceased was a farmer and a cereal vendor at Kianjai market. Similarly, the evidence that the deceased had a husband and 2 children was not displaced. The appellant was the deceased's brother in law and had obtained a limited grant for purposes of filling the suit. Though the trial court was of the opinion that this suit ought to have been filed by the deceased's husband through a next friend, there was nothing wrong with the appellant filing the suit having obtained the limited grant for letters of administration. His appointment as the administrator of the estate of the deceased gave him the *locus standi* to bring the suit on behalf of the estate.

34. The appellant had pleaded in the plaint that he was bringing the suit on behalf of the estate of the deceased. The trial court clearly fell into error when it held that there were no dependants of the estate whilst **PW4's** evidence was firm and consistent that the deceased left behind a husband and children. This testimony was never shaken in cross-examination.

35. In the circumstances, the trial court should have assessed the loss of dependency. The record shows that there was uncontroverted evidence that at the time of her death, the deceased was a farmer who also engaged in cereal business at Kianjai market. Though there was no proof of earnings, the deceased must have been earning some income from farming and cereal business. She was aged 36 years. Taking into account all the circumstances of this case and being guided by the authorities cited above, and in the absence of prove of earnings, the best approach would be to award a global award.

36. In Kibage vs Rebeka Mwangi Simion & Anor [2017] e KLR the court estimated a farmers income in rural Kisii to be Kshs 6000/= and awarded Kshs. 432,000/=. In Arthur Nyamwate Omutondi & Others vs United Millers ltd [2009] e KLR the court estimated income of a fish monger to be kshs. 4000/= and awarded kshs. 256,000/=.

37. In this regard, a sum of Kshs. 800,000/= would be adequate compensation for loss of dependency to the estate of the deceased. With regard to claim for special damages, the same must fail having not been strictly pleaded and proved as by law required.

38. With regard to damages for pain and suffering, there was uncontroverted evidence that the deceased did not die on the spot. She died at Miethene Sub-County Hospital. It was however not clear the exact time that she succumbed to her injuries. The trial court awarded Kshs 50,000/= which I find to be reasonable in the circumstances and I will not disturb the same.

39. Accordingly, I enter judgment for the Appellants as follows:

1. 1ST APPELLANT

a). Loss of Expectation of Life.....Kshs 100,000/=

b). Loss of Depedancy.....Kshs 800,000/=

TOTAL.....Kshs 900,000/=

Less 30% contribution.....Kshs 270,000/=

TOTAL AWARD.....Kshs 630,000/=

2. 2nd APPELLANT

a). General Damages.....Kshs 1,500,000/=

b). Special Damages..... NIL

TOTALKshs 1,500,000/=

Less 30% contributionKshs.450,000/=

TOTAL AWARDKshs. 1,050,000/=

3. 3rd APPELLANT

a). Pain and Suffering.....Kshs 50,000/=

b). Loss of Expectation of Life.....Kshs 100,000/=

c). Loss of Dependency.....Kshs 800,000/=

TOTAL.....Kshs 950,000/=

Less 30% contribution.....Kshs 285,000/=

TOTAL AWARD.....Kshs 665,000/=

35. The Appellants will also have the costs of these appeals.

DATED and DELIVERED at Meru this 12th day of April, 2018.

A. MABEYA

JUDGE