



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 224 OF 2011

OMAR SHARIF & OTHERS.....APPELLANT

-VERSUS

SUSAN ATIENO JOHN.....RESPONDENT

JUDGMENT

1. The parties in this appeal recorded a consent judgment in the trial court on liability and apportioned same at 70:30 in favour of the plaintiffs (now respondent). The present appeal has been brought by the appellants on account of their dissatisfaction with the assessment of damages by the trial court.

2. The appeal has proceeded by way of written submissions which were filed by the appellants and respondents respectively on 6/6/2017 and 22/3/2017. Both parties attached authorities to their submissions. Counsel for the parties subsequently highlighted their submissions before me.

3. The only issue of determination before me as drawn out by the grounds of appeal and submissions of the parties is whether or not the trial court erred in assessing the damages awarded to the respondent.

4. In considering this appeal, I am conscious of my duty as a first appellate court to re-evaluate the evidence tendered at trial and reach my own conclusions. I am also conscious of the principle that an appellate court would not normally disturb an award unless it is satisfied that the trial court took into account an irrelevant factor or failed to consider a relevant factor or that the award was so inordinately low or high as to be an erroneous estimate of the damage. See *Kemfro Africa Limited t/a Meru Services Gathoni Kanini V A.M.M Lubia & Another, [1982 – 1988] IKAR 777, see also Arrow Car Ltd vs Bimomo & 2 others [2004] KLR 101*.

5. The appellants have stated in their grounds of appeal that the damages awarded were too high; that the court erred in using the multiplier of 20 years and in fixing the deceased's monthly earnings at Kshs. 10,000/= without any proof. They have also faulted the court for awarding special damages, stating that had not been specifically pleaded.

6. The trial court awarded Kshs. 10,000 as the deceased's monthly income. The appellants submit that this amount was erroneous and lacked basis. They submit that no document was produced by the plaintiff to support the claim that her husband used to earn. They argue that the plaintiff ought to have supported her claim with books of account or income tax returns. They place reliance on *Nyamwate & others v United Millers Ltd & 2 others 2004 eKLR* where the court held that "if income is not proved then no award of dependency can issue..."

7. The respondents contend that the multiplicand of Kshs. 10,000/= was modest. They urge that the court can consider the circumstances in each case even where there is no documentary proof. They place reliance on *Richard Omeyo Okuni vs Christine A. Anyango eKLR*.

8. The deceased's wife (PW1) testified that he was employed as a plumber at Safari park hotel with a salary of Kshs. 30,000 and that he later started a welding business from which he earned Kshs. 50,000.

She displayed 2 inter department completion certificates from safari park hotel bearing the deceased's name (exhibit 5 (b)) she also displayed payment receipts for a welding kiosk issued by the Nairobi City Council (exhibit 3(a))

9. I have considered the rival submissions on the disputed issue of the deceased's earnings. It is true that the plaintiff (deceased's wife) did not produce books of accounts to demonstrate his earnings. However this court takes notice that small "Jua Kali" businesses do not usually keep books of account. However, it is not disputed the deceased was making some money with which he supported his family. I do not consider the amount of Kshs. 10,000/= awarded to be unreasonable and therefore have no reason to interfere. I am persuaded by the reasoning in *Ann Njoki Njenga and Umoja Feror Mills vs Walter Bosire 2004 eKLR*.

10. The appellants contend at ground 3 of the appeal that trial court awarded specific damages which had not been pleaded in the plaint. They

correctly cite the law that special damages must not only be pleaded but must be specifically proved see *Equity Bank Ltd v. Gerald Wangombe Thuni [2015] eKLR*. The respondent on the other hand submits that the special damages were pleaded and proved.

11. I have carefully perused the record. At paragraph 7 of the amended plaint dated 8/7/2010 particulars of special damages are set out as follows:- mortuary fees (4,000) police abstract (200), copy of record (500), funeral and burial expenses 89,000/=; and legal cost of obtaining grant letter of administration 1,000/=.

The court awarded special damages of Kshs. 75,000/= funeral expenses, and ksh. 500/= for copy of records. It is the award of Kshs. 75,000/= for funeral expenses that is contested.

12. The appellant contends that this special damage was not pleaded. This is not however true as demonstrated by the amended plaint. On the issue of proof, the respondent submits that the same was proved through the testimony of PW1, the deceased's widow. She told the court that they had bought a coffin and hired 3 motor vehicles from George woods funeral services to transport the body and mourners from Nairobi to Butere. She produced a copy of a receipt MF14 for Kshs. 75,000/=. This copy receipt was subsequently produced by consent of the parties.

13. From the testimony of PW1 which remained unshaken in cross-examination and Exhibit 4 which I have already observed was produced by consent I find that special damage relating to burial and funeral expenses proved on a balance of probability.

14. There was no dispute that the deceased had 6 dependants being the wife and 5 minor children. There was also no evidence to suggest that he was not the bread winner of the family which would suggest a ratio other than 2/3 dependency ratio. After carefully evaluating the evidence, I find no reason to disturb either the multiplicand of the years lost or the dependency ratio.

15. In the final analysis I have found no merit in this appeal. It is dismissed with costs to the respondents. The award in the trial court is confirmed.

*Judgment signed at Garsen on.....day of June 2018.*

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**R. LAGAT KORIR**

**JUDGE**

*Judgment delivered dated and Counter signed at Nakuru this 21<sup>st</sup> day of June, 2018.*

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**JANET MULWA**

**JUDGE**

**In the presence of**

.....Court Assistant

.....for Appellant

.....for Respondent