



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 65 OF 2017

JOAN GACHERI.....APPELLANT

VERSUS

SABINA MWOMBURI.....RESPONDENT

(Being an appeal from the Judgment delivered on 13th July, 2014

by Hon. P. M. Wechuli (Resident Magistrate) Principal Magistrate's

Court at Maua in CMCC No. 51 of 2015).

JUDGMENT

1. The Respondent, Sabina Mwomburi filed suit as the legal representative of the estate of James Mwongera, her late husband who died in a road traffic accident. During the hearing of the case before the Lower Court, the parties recorded a consent on liability at 30% against the Respondent and 70% against the Appellant.

2. The case proceeded for assessment of damages. The Respondent who was the only witness called testified that the deceased left behind 4 children and a wife. The earnings of the deceased were given as Ksh.20,000/= per month. Receipts for the sum of Ksh. 16,300/= were produced as support of special damages.

3. In the judgment of the lower court the trial magistrate made the following awards:

- | | |
|---------------------------------|-----------------|
| (a) Pain and suffering | Ksh.10,000/= |
| (b) Loss of expectation of life | Ksh.100,000/= |
| (c) Special damages | Ksh.16,300/= |
| (d) Loss of dependency | Ksh.2,880,000/= |
- (Ksh.20,000x12x18x2/3)

Total	<u>Ksh.3,006,300/=</u>
Less Contribution 30%	Ksh. 901,960/=
Grand Total	<u>Ksh.2,104,320/=</u>

4. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:

- (a) That there was no basis for the application of a Multiplicand of Ksh.20,000/=
- (b) That the Multiplier of 18 years was inordinately high.
- (c) That the assessment of general damages was erroneous.
- (d) That the Appellant's submissions were disregarded.
- (e) That the award by the trial magistrate is against the law and the weight of evidence.

5. The appeal was canvassed by way of written submissions which I have considered.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. The evidence of the Respondent (PW1) reflects the age of the deceased as 42 years as reflected in the Death certificate that was produced as an exhibit. The Death Certificate reflects the date of death as the same day of the accident. The ages of the four children left behind by the deceased ranges from 13 years for the eldest to less than one year for the youngest child. This evidence was maintained during cross-examination and is uncontroverted by any other evidence.

8. The award of Ksh.10,000/= for pain and suffering and Ksh.100,000/= for loss of expectation of life is reasonable and within the range of similar awards (See for example **Benedeta Wanjiku Kimani (Suing as the Administrator of the estate of Samwel Njenga Ngunjiri deceased) v Changwon Cheboi & another HCCC Nku 373/08; Kenya Power & Lighting Co. v Charles Obeya Ogeta (Suing as legal representative of the estate of Esther Nyanchoka Obegi [2016] eKLR)**

9. At the age of 42 years, the deceased could have worked up to 60 years and beyond. However, the vicissitudes of life have to be taken into account and the fact that the award will probably be made in a lumpsum. The young age of the children left behind must also be taken into account. The last born would have been dependent on the deceased beyond the age of 60 years. In the premises I find the Multiplier of 18 years reasonable (See for example **Kenya Power & Lighting Co (supra)** where a Multiplier of 12 years was applied for a deceased aged 47years; **Benedeta Wanjiku Kimani (supra)** where a multiplier 16 years was adopted for a 44 years old deceased).

10. On dependency, the Court Appeal expressed itself in the case of **Hellen Waruguru Waweru (suing**

as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR as follows:

“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years of purchase. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions”

11. The evidence on earnings reflect that the deceased used to earn about Ksh.20,000/= per month as a worker in the quarry crushing and selling ballast and was also a farmer. That the deceased maintained his wife and children and paid school fees. There are no details of the amounts used to take care of the family or to pay the school fees. The lack of these details have led to submissions by the Appellant’s side that the figures seem to have been plucked from the air. Although no documents were produced in support of the dependency, not every Kenyan keeps records of earnings. The same is dependent on the type of work and level of literacy.

12. The Court of Appeal in the case of **Jacob Ayiga Maruja & another v Simeane Obayo, Civil appeal No. 107 of 2002 [2005] eKLR** stated as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

13. The evidence herein establishes that the deceased supported his young family. The question is to what extent. The evidence on the exact earnings of the deceased was not availed. Taking into account the circumstances of this case, I would estimate the earnings of the deceased at a round figure of Ksh.5,000/= using the minimum labour wages Regulations 2012 for a general worker. (See for example **Beatrice W. Murage v Consumer Transport Ltd & another [2014] eKLR**).

14. With the foregoing, the total award works out as follows:

(a)Pain and suffering	Ksh.10,000/=
(b)Loss of expectation of life	Ksh.100,000/=
(c)Loss of dependency	Ksh.720,000/=
	(Ksh.5000 x 12x 18 x 2/3)=
(d)Special damages	Ksh.16,300/=
	<u>Ksh.846,300/=</u>
Less 30% contribution	Ksh.253,890/=
Total	<u>Ksh.592,410/=</u>

15. The upshot is that the judgment of the trial court is set aside and substituted with judgment for the sum of Ksh.592,410/= plus interest and costs. The appeal having been partially successful, each party shall bear own costs of the appeal.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Meru this 31st day of July, 2018

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