



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 18 OF 2014

STEPHEN KIARIE MURUGURU.....APPELLANT

VERSUS

SELEMAN HAMADI KOI and SUBIRA

HUSSEIN MWADAGO (Suing as the Legal Representatives of the estate

of ADAM HUSENI DAGO (DECEASED).....RESPONDENTS

(An appeal from the Judgment of Hon. R. Odenyo, SPM, delivered on 23rd January, 2014 in Mombasa Chief Magistrate's Court Civil Case No. 2108 of 2011)

JUDGMENT

1. The legal representatives of the deceased on 14th September, 2011 filed a suit in the lower court following the death of Adam Huseni Dago in a road traffic accident that happened on 27th February, 2011. The Hon. Magistrate entered Judgment in favour of the plaintiffs (respondents).
2. The defendant (appellant) being dissatisfied with the said Judgment filed a memorandum of appeal on 20th February, 2014. He raised the following grounds of appeal:-
 - (i) The Learned Magistrate erred in fact and law by disregarding the authorities of the Appellants which stipulate the rationale for arriving at the appropriate quantum of damages; and
 - (ii) That the Learned Magistrate erred in fact and law by awarding exorbitant and excessive quantum of damages not based on any authority.
3. For the above reasons, the appellant prays for:-
 - (i) This Hon. Court to set aside the Judgment of the subordinate court; and re-assess the issue of liability and damages payable, if at all;
 - (ii) Any other or further orders that this court may deem just and expedient to grant; and
 - (iii) That the respondent be condemned to pay the costs of this appeal.
4. The appellant filed his written submissions on 12th June, 2018. The respondents filed theirs on 18th July, 2018. Mr. Mulama, Learned Counsel for the appellant informed the court that the appeal challenges the quantum of damages under the heads of pain and suffering, the multiplier and multiplicand applied. He stated that they were not challenging the award for special damages, the award for loss of expectation of life and the dependency ratio.
5. In submitting on the award for pain and suffering, Counsel for the appellant argued that the award of Kshs. 100,000/= was exorbitant and that no judicial precedent was relied on in making the said award. He stated that the deceased died 11 hours after the accident and as such an award of Kshs. 50,000/= should have been adequate. According to Mr. Mulama, 11 hours was not a long duration of time before death. In his written submissions, he cited the cases of **Marwanga Jeffern vs Jeckton Ochieng and Another** [2015] eKLR, **Charles Masoso Barasa and Another vs Chepkoech Rotich and Another** [2014] eKLR, where awards for pain and suffering in the sum of Kshs. 10,000/= and

Ksh.15,000/= respectively, were upheld for deceased persons who died within hours of the accident. Counsel urged the court to set aside the award of Kshs. 100,000 under pain and suffering and to substitute it with Kshs. 15,000/=.

6. The multiplicand that was adopted of Kshs. 15,000/= was challenged on the ground that PW1 and PW2 testified about two amounts that were contradictory as being the earnings of the deceased. Counsel submitted that the Hon. Magistrate should have relied on the Regulation of Wages Order for the year 2010 as the deceased died on 27th February, 2011. He indicated that the earnings of a general worker as at that time were Kshs. 6,743.00 per month. It was contended that the Hon. Magistrate erred in principle by failing to recognize and apply the guidelines of the wages order to come up with the deceased's earnings and thereby arrived at the wrong finding. Mr. Mulama cited the case of **Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita and Another** [2011] eKLR, where the Judge held that in the absence of proof of income in the said case, the trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005. Mr. Mulama urged the court to substitute the amount of Kshs. 15,000/= with Kshs. 6,743/= as the monthly earnings of the deceased.

7. On the multiplier of 13 years adopted by the Hon. Magistrate, it was submitted that it was resorted to due to the age and number of children the deceased had. It was argued that there was no guarantee that the deceased would have lived for 13 years in such a high risk job as vagaries and vicissitudes of life, such as diseases and the standards of living in Kenya would have affected the deceased's life at the age of 52 years. It was stated that the Hon. Magistrate failed to consider relevant facts that would have led to a better decision.

8. Counsel cited the case of **Mombasa Maize Millers Limited vs W I M (suing as the representative of JAM (deceased))** [2016] eKLR, in which the Court of Appeal held that the choice of multiplier is a matter of the court's discretion, which discretion has to be exercised judiciously with a reason. He submitted that a multiplier of 5 years should have been adopted.

9. Mr. Mulama referred to the Court of Appeal decision of **Hannah Wambui vs Kagwe Tea Factory and Another** [2010] eKLR, where the court adopted a multiplier of 4 years for a 56 year old man.

10. Counsel held the position that the Hon. Magistrate in the lower court case did not exercise his discretion properly and prayed for the awards made against the appellant to be set aside. He also prayed for the appeal to be allowed.

11. Mr. Nyabena, Learned Counsel for the respondents in opposing the appeal relied on the case of **Innocent Katie Makaya vs Peter Kipkore Cheserek and Another** [2015] eKLR, where the court set out the principles to be considered in the assessment of damages. He also relied on the case of **Kemfro Africa Ltd t/a Meru Express Services [1976] and Another vs Lubia and Another** [1987] eKLR 30. He submitted that award of damages is an exercise of discretion which should not be disturbed lightly.

12. On the issue of pain and suffering, it was submitted that the deceased died 11 hours after the accident. Mr. Nyabena cited the case of **Faraj Mohamed vs Tawfiq Bus Service & 2 others** [2007] eKLR, where Judge Serگون made an award of Kshs. 100,000/= for pain and suffering to a deceased who suffered for 8½ hours. He prayed for the award of Kshs.100,000/= for pain and suffering to be upheld. He distinguished the authorities cited by Mr. Mulama on the said issue by stating that the deceased persons in the authorities so cited, died within minutes or immediately after the accidents.

13. On the issue of the multiplier, it was submitted that adoption of a multiplier is an exercise of discretion by the trial court and the Hon. Magistrate in the lower court the subject of this appeal noted that at 52 years of age, the deceased had 6 children to take care of. As such, he would have worked harder to provide for them.

14. Counsel cited the case of **Hannah Wambui vs Kagwe Tea Factory and Another** (supra) where the court noted that the deceased therein would have had to work longer to provide for his young children. Reference was made to Nakuru HCCC 59 of 1997, **Rahab Wanjiku vs Njoroge Mungai**, where the deceased was 64 years old and a multiplier of 8 years was adopted. Mombasa HCCC 301 of 2001, **Floice Adema Onami vs Kezia Muthoni Ngure** was also cited where a multiplier of 15 years was applied for a deceased person who was 50 years old. The respondent's Counsel submitted that there are no fast and hard rules for adoption of a multiplier thus the Hon. Magistrate in this case did not err by adopting a multiplier of 13 years as no irrelevant factors were considered.

15. With regard to the multiplicand applied, it was argued that the deceased not only used to dig pits and wells, but he was a farmer too as per the evidence of PW1. It was submitted that the deceased was a widower and that his children depended on him to provide for them. It was further stated that he would use about Kshs.10,000/= per month on his children. Mr. Nyabena therefore submitted that a multiplicand of 13 years was proper.

16. In responding to the proposal that was made in the lower court for the sum of Kshs. 5,000/= to be applied as the multiplicand, Counsel for the respondent stated that guidelines on minimum wages apply where no evidence has been adduced as to the earnings of a deceased person. He relied on the case of **Mombasa Maize Millers Ltd WIM suing as the legal representative of JAM (deceased)** (supra) to demonstrate that the Hon. Magistrate exercised his discretion judiciously. Counsel prayed for the appeal to be dismissed with costs. Mr Nyabena did not submit on the proposal made on appeal for this court to adopt a multiplicand of Ksh.6,743.00

ANALYSIS AND DETERMINATION

17. The duty of the first appellate court is to analyze and re-examine the evidence adduced before the lower court and come to its own conclusion. See **Peters vs Sunday Post** [1958] EA 424 at P. 429 where Sir Kenneth O'Conner P stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

18. The evidence adduced before the lower court by PW1, Subra Hussein Dago, the deceased's younger sister was to the effect that she received a call on 27th February, 2011 that the deceased had been involved in an accident. She went to Msabweni District Hospital where she found the deceased severely injured. They transferred him to Coast General Provincial Hospital where he died on the same day at 4:00 p.m. She stated that the deceased was injured at about 5:00 a.m. PW1 further testified that the deceased was a widower with 6 children and he used to do casual jobs such as digging of wells and pits. He was also a farmer and his children depended on him. PW1 produced the deceased's burial permit and death certificate as well as other documentary evidence. It was her evidence that the deceased used to earn about Kshs. 15,000/= (per month). He was 52 years old and in good health. She prayed for general and special damages as well as costs.

19. PW2 was Hamisi Alawi Balazi who used to work with the deceased. He stated that he knew that the deceased had 6 children who depended entirely on him as he was a widower. PW2 stated that they would get about Kshs. 10,000/= per job. On being cross - examined, he clarified that the deceased used to get about Kshs. 10,000/= per month.

20. In his Judgment, the Hon. Magistrate while awarding the sum of Kshs. 100,000/= to the respondent under the head of pain and suffering noted that the accident the deceased was involved in happened at 5:00 a.m, and the deceased died at 4:00p.m, which was 11 hours later. The Hon. Magistrate was therefore of the view that the deceased suffered excruciating pain for some hours before he died.

21. In **Butt vs Khan [1981] KLR 349**, Law, JA stated as follows:-

“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.”

22. In order to establish if the above award was too high, this court referred to the case of **Premier Dairy Limited vs Amarjit Singh Sagoo and Another [2013] eKLR**, where the Court of Appeal awarded Kshs. 75,000/= for pain and suffering for a deceased who died on the spot. In the case of **David Kahuruka Gitau and Another vs Nancy Ann Wathithi Gitau and Another [2016] eKLR**, the High Court on appeal upheld an award of Kshs. 100,000/= for pain and suffering for a deceased who died barely 30 minutes after the accident. In the present case, the deceased died 11 hours after the accident. It is therefore my finding that the Hon. Magistrate exercised his discretion under the head of pain and suffering. I decline to vary the award of Kshs. 100,000/=.

23. On the multiplicand adopted of Kshs.15,000/=, the Hon. Magistrate was of the view that with the kind of work that the deceased used to do, he must have been earning Kshs. 500/= per day. He went ahead to multiply the said amount with a 30 day working period to arrive at the monthly sum of Kshs. 15,000/=. In my considered view, the Hon. Magistrate misdirected himself when he held that the deceased who used to dig wells and pits used to work for 30 days in a month. This is for the reason that the deceased was unlikely to work for 30 days in a month without a break. This court is therefore bound to interfere with the said award by reviewing the number of days the deceased worked in a month from 30 to 26 days. The said figure has been arrived at after bearing in mind the need of setting aside one day of rest in a 7 day period. Thus the award works out as follows 6 days x 4 weeks x 500= Kshs. 12,000/=.

24. Taking into consideration the work the deceased was doing, the sum of Kshs. 6,743/= which Mr. Mulama submitted as being the amount which should have been adopted as a multiplicand was on the lower side. I therefore vary the monthly earnings of the deceased from Kshs. 15,000/= to Kshs. 12,000/= per month. I will therefore adopt a multiplicand of Kshs.12,000/=.

25. The award of the multiplier of 13 years was challenged for the reason that the deceased was 52 years old. It was submitted that a multiplier of 5 years would have served the purpose as the deceased was involved in a high risk job and vagaries and vicissitudes of life would have come to play.

26. In the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi and Another [2013] eKLR**, Judge Emukule (as he then was) stated as follows:-

“There is indeed imponderables of life, and life is a mystery of existence. It is not however the province of the court to determine or explore those imponderables.”

27. Applying the above reasoning to this case, the evidence was that the deceased was in good health, he had 6 minor children at the time he died, with the youngest aged 6 years. I do agree with the Hon. Magistrate that the due to the age of his children, the deceased would have worked for a longer duration of time and harder to provide for them as he was their sole provider.

28. In the case of **Hanna Wangaturi Moche and Another vs Nelson Muya**, Nairobi HCCC No. 4533 of 1993, the court stated as follows:-

“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum”.

29. With a view of establishing if the multiplier applied was erroneous, I have considered the authorities cited by Counsell on record and looked at various authorities on the multiplier applied in cases, one of which the deceased was of the same age as the deceased in this case. I have also considered cases where the deceased were older. In the case of **Makario Makonye Monyancha vs Hellen Nyangena [2014] eKLR**, the court adopted a multiplier of 10 years for a 52 year old deceased. In the case of **Sokoro Plywood Limited and Another vs Njenga Wainaina [2007] eKLR**, the High Court while sitting on appeal upheld the decision of the lower court in adopting a multiplier of 10 years where the deceased was 60 years old. In the case of **John Wamae and 2 Others vs Jane Kituko Nziva and Another [2017]** the deceased was 61 years old, the High Court when sitting on appeal upheld a multiplier of 9 years that had been adopted by the trial court.

30. In the case cited by Mr. Mulama of **Hannah Wambui vs Kagwe Tea Factory and Another** (supra), the Court of Appeal applied a multiplier of 4 years for a 56 year old man who died in an accident for the reason that he left behind a tea farm from which his wife was plucking tea and benefiting from the proceeds. The deceased also left behind a butchery business from which his wife was making some income. The above authority is distinguishable from the present case as the deceased herein was a widower whose wife had predeceased him. Upon his death, his 6 young children were orphaned. I therefore hold that the Hon. Magistrate did not err by adopting a multiplier of 13 years in the present case. It also common ground that each case must be determined in accordance with its special circumstances.

31. The final award therefore works out as follows:-

- | | |
|----------------------------------|---|
| (i) Pain and suffering | Kshs. 100,000/= |
| (ii) Loss of expectation of life | Kshs. 100,000/= |
| (iii) Loss of dependency | Kshs. $12,000 \times 12 \times 13 \times \frac{2}{3} =$ |
| (iv) Special damages | Kshs. 40,000/= |

Gross award Kshs. 1,288,000/=

32. The appeal is therefore allowed to the above extent. The appellant shall meet two thirds of the costs of this appeal and of the case in the lower court. Interest is awarded to the respondents at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of September, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mulama for the appellant

Mr. Wanjala holding brief for Mr. Nyabena for the respondent

Mr. Oliver Musundi - Court Assistant