



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 30 OF 2016**

**NYERI FOCUS SELF HELP GROUP.....APPELLANT**

**VERSUS**

**MONICA NJERI KIMANI**

**(Suing as the legal administrator**

**of the estate of the late NANCY WAIRIMU).....RESPONDENT**

**JUDGMENT**

1. The appeal and cross appeal arise from the judgment of Honorable C. Wekesa, SRM in Nyeri PMCC No.44 of 2015; the respondent herein being the mother and legal representative of the Estate of the late Nancy Wairimu sued for damages arising out of an accident that occurred on 8<sup>th</sup> December, 2013.

2. Parties entered into a consent on liability at the ratio of 85:15 in favour of the respondent; after a hearing on assessment of damages, judgment was awarded by the trial court in the following terms:-

(i) Pain and Suffering - Kshs.50,000/=

Loss of expectation of Life – Kshs.100,000/=

(ii) Loss of dependency – Kshs.2,048,000/=

(iii) Less: contributory negligence of Kshs.314,700/=

to make an award of Kshs. - 1,783,300/=

(iv) Special damages - Kshs.57,458/=

(v) The award of loss of expectation of life was deducted from the total award to make the final award of Kshs.1,740,758/=.

3. The appellant being dissatisfied with the trial Court's judgment on loss of dependency filed this appeal and seeks to have set it aside; the appellant listed four (4) grounds of appeal in its Memorandum of Appeal dated the 7<sup>th</sup> June, 2016 which are as summarized hereunder;

(i) The trial Magistrate erred in awarding loss of dependency at Kshs.2,048,000/=

(ii) The trial Magistrate erred in adopting a dependency ratio of 2/3;

(iii) The trial Magistrate erred in adopting a multiplicand of Kshs.8,000/= instead of awarding a global figure;

4. On the other hand, the Respondent cross appealed. The grounds in the cross appeal dated 18<sup>th</sup> July, 2016 can be summarized as follows:

(i) The trial Magistrate erred in adopting a multiplicand

of Kshs.8,000/= and should have awarded a

multiplicand of Kshs.10,107/= as per the Minimum

Wage 2013;

- (ii) The award of loss of expectation of life should not  
have been deducted from the total award given.

5. Both parties have prayed for the trial Court's award on loss of dependency to be set aside.

#### **ISSUES FOR DETERMINATION**

6. After reading the written submissions filed by Counsels for both parties together with the annexed authorities, the issues found and framed for determination are as follows;

- (i) What was the age of the deceased;
- (ii) Whether a global figure for lost years should be awarded instead of loss of dependency;
- (iii) Whether the award on loss of dependency was inordinately high;
- (iv) Whether the award under the Law Reform Act should be deducted from the award on loss of dependency;

#### **ANALYSIS**

7. In determining this appeal this court is guided by the Court of Appeal decision in the case of Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123, sets out this court's duty which is to re-evaluate and re-examine the evidence adduced by the trial court in order to reach an independent finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

*"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."* (See also **LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

#### **What was the age of the deceased:**

8. At the trial in the lower court, the respondent testified that the deceased was aged 17 years at the time of her death. In support of her contention, she produced an Immunization Card marked as MFI-1. This card indicates that the deceased was born on 10/07/1996. The respondent also produced a burial permit as 'Pexh4 (g)' which indicates that the deceased was aged 19 years at the time of her death.

9. In view of the fact that the Immunization Card was only marked for identification and not produced as evidence, it cannot be relied upon; this court shall adopt the age provided in the burial permit which is 19 years. Coincidentally, this is the age adopted by the respondent in the submissions in the trial Court and the appellant in the submissions to this appeal;

10. This court finds that the deceased was aged 19 years at the time of the accident;

#### **Whether a global figure for lost years should be awarded instead of loss of dependency:**

11. In view of the fact that the deceased was 19 years old when she died, the issue of whether an award under lost years or loss of dependency arises. At the trial of this matter, the respondent testified the deceased had sat for her KCSE exams which results had come out that year. She testified that the deceased had aspirations of being an air hostess. There was however no evidence of any steps taken by the deceased towards this career pattern. There was also no evidence given on the earnings of an air hostess. The respondent further testified that the deceased would plait hair and use the proceeds therefrom to support her. Similarly there was no evidence to support this.

12. From the foregoing, it is evident that the deceased may have been 19 years of age however the circumstances point out to the fact that she was a dependent of her mother until the time of her demise. The deceased was not employed and since her KCSE results had only just come out, she would probably still be dependent on the respondent for some time until her career took off.

13. The upshot is that with the lack of evidence of the employment of the deceased, dependency by the respondent was not proved. This also means that in the circumstances, minimum wage cannot apply. Therefore the trial Court should have made an award for lost years and not loss of dependency.

14. For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles

set out in various decisions. In the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

***“An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low.”***

15. Similarly in the case of **Kenya Breweries Ltd vs Saro** [1991] eKLR it was held that,

***“...It is now well established that this Court can only interfere with a trial judge’s assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.....”***

16. This court is satisfied that the trial magistrate proceeded on the wrong principles in awarding loss of dependency in the sum of Kshs.2,048,000/=.

17. From the evidence produced at the trial Court, it is speculative as to what the deceased’s salary would be. Also as earlier indicated, no evidence was provided as to what an air hostess’s salary was;

18. Nevertheless this court is inclined to award damages as these are payable to the parent of a deceased irrespective of the child’s age; in calculating the damages for the lost years this court shall adopt a multiplicand of Kshs. 7,000/=.

19. This Court also takes into consideration the fact that the deceased would probably have married and moved out of her mother’s home; therefore a ratio of 1/3 is found to be sufficient. The dependent herein is the deceased’s mother and the deceased would probably have spent 2/3 of her salary on herself and her future family.

20. As for the multiplier, taking into account the vicissitudes of life, this court shall adopt 30 years. The award therefore works out thus:  $30 \times 12 \times 7,000 \times 1/3 = 840,000/=$ .

**Whether the award under Law of Reform Act be deducted from that given in the Fatal Accident’s Act?**

21. This Court shall adopt the precedent where the award given under the Law of Reform Act ought to be deducted from the sum awarded under the Fatal Accident’s Act as the benefit in both awards shall be enjoyed by the same dependents.

22. There was no appeal from the awards given under the Law Reform Act that is loss of expectation of life in the sum of - Kshs.100,000/= and pain and suffering in the sum of – Kshs.50,000/=. These awards shall be deducted from the award on lost years to make the final award Kshs.690,000/=.

**FINDINGS AND DETERMINATION**

23. The appeal is allowed in the terms set out herein above.

24. The cross appeal has no merit and is hereby dismissed with no order as to costs;

25. This court finds that the trial magistrate proceeded on the wrong principles on the award for loss of dependency; further the award is found to be inordinately high; the trial Court’s award is hereby set aside and substituted with an award for lost years in the sum of Kshs.840,000/=.

26. The award given under the Law Reform Act shall be deducted from the award on lost years.

27. The final award shall be in the sum Kshs.690,000/=

28. The appellant shall have costs of the appeal;

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 27<sup>th</sup> day of September, 2018.**

**HON.A. MSHILA**

**JUDGE**