



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 56 OF 2016

NOAH MANGARA MERU.....1ST APPELLANT

PATRICK WAWERU2ND APPELLANT

VERSUS

CHRISTINE KARIMI NDERI &

CATHERINE WACUKA NDERI (*suing as the legal representative*)

of the Estate of SIMON NJAGI MBOGO-DECEASED.....RESPONDENTS

J U D G M E N T

1. The appellant lodged this appeal against the judgment of Senior Magistrate Embu delivered on 15/03/2016 in CMCC No. 279 of 2013. The respondent successfully sued the appellant for general and special damages. Judgment was entered in favour of the respondent for general damages of Kshs.3,610,000/=, special damages of Kshs.18,750/= plus costs and interest. The damages were subject to the apportionment based on the consent of the parties of 80:20 ratio.

2. In the Memorandum of Appeal, the appellant states that he was dissatisfied with the judgment and relies on four grounds as follows:

a) *THAT the learned trial Magistrate erred in fact and in law in adopting the deceased's gross salary as the multiplicand instead of the net salary in assessment of damages awardable under the Fatal Accidents Act thus arriving at an inordinately high award.*

b) *THAT the trial Magistrate erred in fact and law in basing assessment of damages awardable under the Fatal Accidents Act on the wrong and irrelevant principles, and against the evidence on record thus arriving at a manifestly excessive award.*

c) *THAT the trial Magistrate erred in law and fact in failing to deduct sums awarded under the Law Reform Act from the final award thus double compensating the estate of the deceased.*

d) *THAT the learned trial Magistrate erred in law and fact in failing to take into account the defendant's submissions and the binding authorities cited thereon thereby arriving at an excessive award of damages in the matter.*

3. Both parties argued the appeal through written submissions filed by their respective Advocates. Muthoga & Gaturu & Co. Advocates represented the appellants while Mwathi Njue & Co. Advocates represented the respondent.

4. I have perused the submissions of the Counsels and the grounds of the appeal. The issue for determination are hereby identified as follows: -

a) *Whether the learned Magistrate applied the wrong principles thereby arriving at an inadvertently high figure for general damages;*

b) *Whether the Magistrate erred in law and fact in failing to deduct the sum awarded under the Law Reform Act from the general damages, and*

c) *Who will meet the costs of the Appeal.*

5. The duty of the first appellate court was discussed in the case of ***SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123***, where it was observed thus: -

“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 conclusion. 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 Judges findings of fact if it appears either that he has clearly failed in 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 on the case generally”

6. The appellant submitted that the learned Magistrate was wrong in adopting the multiplicand of the gross salary of the deceased of Kshs.15,000/= instead of the net salary. He relied on some authorities.

i. **MARTIN MAITIMA M’AMATHI VS SIMON NJOROGE NJUGUNA NJOROGE(DSD) [2018] eKLR** where the court observed as follows: -

“The multiplicand is the net income of the deceased and it is a question of fact.”

ii. **ELIUD MUSANGI VS GILBERT OMEDO [2018] eKLR** where it was held: -

“When the income of the deceased is derived from his own earnings, ‘it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have been available to the benefit of the individual claiming compensation.’ The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependents...

7. The respondent argued that there is no set rule on whether the court should adopt the gross or the net salary as the multiplicand. According to the respondent, the question applied is what is fair and just to the parties and that this is the principle the learned Magistrate applied. He used his discretion as is the practice in awarding general damages of Kshs.3,360,000/=. The figure was not inordinately high as for the court to interfere with it.

8. It was also argued that the respondent adduced evidence on the salary of the deceased by producing a payslip with Kshs.13,930/= made up of Kshs.15,000/= less mandatory deductions of kshs.1,070/=. The deduction of Kshs.5,015/= was a one-off deduction of NSSF arrears as opposed to monthly deductions. It would be wrong for the court to use the net salary in the payslip of Shs.8,915/= as suggested by the appellant.

9. On this issue, the principles guiding courts in whether or not to interfere with the quantum of damages were clearly set out in the case of **KENFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES & ANOTHER VS A.M. LUBIA & ANOTHER (NO.2) [1982-88] 1 KAR 727** where the court held:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

10. The deceased was aged 32 years at the time of his death. He was survived by a wife and two children aged 5 and 1 year and had a mother who depended on him. The plaintiff testified that he earned Kshs.15,000= a month and produced the payslip.

11. A close look at the slip shows there were some three deductions entitled *NSSF* and *PAYE* arrears totaling to Kshs.5,016/=. Arrears are deducted only for the period one has not paid or been deducted for some financial commitment. In this case, it was the statutory deductions of *NSSF* and *PAYE*. The respondent explained it was a one-off deduction which was not to be repeated. The rest of the deductions expected to run on monthly basis were Kshs.1,070/=.

12. The appellant’s argument that the arrears of Kshs.5,016/= ought to have been reduced from the monthly salary was not correct since it was one-off. It is only the figure of Kshs.1,070/= that was supposed to be considered in calculating the net salary of the deceased.

13. The Magistrate misdirected himself in using the gross salary as the multiplicand. Each employee is required to pay tax and contribute to the statutory deductions. However, I noted that he reduced the amount by one third (1/3) in the assessment.

14. I come to a conclusion that the correct amount for the multiplicand ought to have been Kshs.15,000/= less Kshs.1,070/= leaving Kshs.13,930/=.

15. The learned Magistrate applied the wrong principle in this regard. I find nothing wrong with the multiplier of 28 years at the time of death.

16. The damages for loss of dependency is awarded as follows: -

$$13,900 \times 28 \times 12 \times \frac{2}{3} = 3,113,600/=$$

17. It was the contention of the appellant that the amount of Kshs.150,000/= awarded for loss of expectation of life under the Law Reform Act was too high. The Counsel relied on the case of **ELIUD MUCHURU RUGA VS NDUNG’U JOHN & ANOTHER [2018] eKLR**

where it was held that amounts between Kshs.70,000/= - 100,000/= were adequate compensation for that item.

18. In this item, the respondent did not present any submission. In my considered view the amount of Kshs.100,000/= in **the ELIUD MUCHURU RUGA case (Supra)** was made this year in 2018 and I find it reasonable and adequate in this case.

19. I wish to state that the difference of Kshs.50,000/= in this item of loss and expectation of life is in my opinion inordinately high. For this reason, I award Kshs.100,000/= in this item and set aside the figure of Kshs.150,000/= awarded by the court below.

20. On the issue of deducting the award for Law Reform from the award for loss of dependency under the Fatal Accident's Act, the two Counsels relied on decided case.

21. Section 2(5) of the Law Reform Act states:

(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act (Cap. 32) or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

22. Section 4(2) of the Fatal Accidents Act sets out sums payable under other laws which must be taken into account in assessing damages under the Act. The Law Reform Act is not one of those laws mentioned under Section 4(2). Furthermore, the words used in the provision are "taken into account" and not "deducted". This is in a situation where the same persons are benefiting from the awards under the Law Reform Act and the Fatal Accidents Act.

23. It was held in the case of **Kemfro (Supra)** as follows: -

"To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction as suggested by Mr Barasa".

24. Similarly, the court in the case of **RICHARD OMEYO OMINO VS CHRISTINE A. ONYANGO [2009] eKLR** applied the same principle.

25. In view of the above authority I find that there is no requirement that the award under the Law Reform Act be deducted from the award under the Fatal Accidents Act. The learned Magistrate took into account the amount he awarded under the Law Reform Act while making the award under the Fatal Accident Act. As such there was no double benefit to the respondents in the awards made.

26. I find this appeal only partly successful. The summary of the award is as follows: -

Pain and suffering	- Kshs. 100,000.00
Loss of dependency	- Kshs. 3,113,000.00
Less of expectation of life	- Kshs. 100,000.00
Special damages	- Kshs. <u>18,750.00</u>
	Kshs. <u>3,332,250.00</u>
Less 20% contribution	Kshs. <u>664,470.00</u>
Total	- Kshs. <u>2,665,880.00</u>

27. The appellant will meet the costs of the appeal.

28. It is hereby ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 23RD DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Njenga for Njue for Respondent