



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 582 OF 2016

CHARLES KARURU NDUNGU.....APPELLANT

VERSUS

WINFRED WANJIRU GITAU.....RESPONDENT

JUDGMENT

1. The appellant, *Charles Karuri Ndungu* was the defendant in a suit filed in the lower court by the respondent in her capacity as the legal and personal representative of the estate of her late daughter *Hannah Wambui Gitau*.

2. In a plaint dated 13th March 2012, the respondent sought general and special damages under the *Law Reform Act* and the *Fatal Accidents Act*. She averred that on or about 15th March 2009 along Thika Road, the deceased was crossing the road on a pedestrian crossing when the defendant negligently drove motor vehicle registration number KAW 670H causing it to collide with the deceased occasioning her fatal injuries.

3. The trial court's record reveals that interlocutory judgment was initially entered against the appellant and case proceeded for formal proof after which judgment was delivered.

However, following a consent recorded by the parties on 19th April 2016, the judgment was set aside and judgment on liability was entered at the ratio of 15:85 in favour of the plaintiff. Parties also agreed to file written submissions on quantum.

4. On 19th August 2016, the learned trial magistrate *Hon. L.A. Arika* (SPM) rendered her decision on quantum as follows:

- | | |
|--|------------------------|
| i. Pain and suffering - | KShs.10,000 |
| ii. Loss of expectation of life - | KShs.100,000 |
| iii. Loss of dependency - | KShs.3,840,000 |
| Less loss of expectation of life- | <u>KShs. (100,000)</u> |
| Subject to contribution - | KShs.3,740,000 |
| iv. Special damages subject to contribution- | KShs.70,000 |
| v. Interest on general damages from date of judgment and interest on special damages from date of filing suit. | |
| vi. Costs of the suit. | |

5. The appellant was aggrieved by the trial court's judgment on quantum hence this appeal.

In the memorandum of appeal dated 8th September 2016, the appellant did not challenge the trial court's award of damages under the *Law Reform Act*. The appellant only attacked the damages awarded to the respondent for loss of dependency and complained that the learned trial magistrate erred by adopting a multiplier of 32 years without taking into account life's vagaries and vicissitudes and in adopting a dependency ratio of $\frac{2}{3}$ when dependency had not been proved and the deceased was not married with children.

The appellant contended that the trial court applied the wrong legal principles and thereby arrived at an erroneous decision on quantum. In

his view, the damages awarded for loss of dependency were manifestly excessive.

6. The appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 30th January 2018 while those of the respondent were filed on 7th September 2018.

7. Needless to say, this being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully alive to the duty of the first appellate court which is to re-evaluate and reconsider all the evidence adduced before the trial court giving due allowance to the fact that unlike the trial court, I did not have the advantage of hearing and seeing the witnesses- See: **Mwana Sokoni V Kenya Bus Service Limited, [1985] KLR 931; Selle V Associated Motor Boat Company Limited, [1968] EA 123.**

8. I have read and considered the parties' written submissions, the evidence on record, the judgment of the trial court and the authorities cited. I have noted that the learned trial magistrate amended her judgment in an addendum dated 9th September 2016 in which she varied the damages earlier awarded for loss of dependency from KShs.3,840,000 to KShs.1,920,000 after changing the dependency ratio from $\frac{2}{3}$ to $\frac{1}{3}$. The multiplier of 32 years however remained the same.

9. In his submissions, the appellant's counsel urged the court to set aside the multiplier of 32 years adopted by the learned trial magistrate contending that the trial court failed to take into account the vagaries of life particularly the fact that the deceased had been employed by a private company and employment upto the retirement age of 60 years was not guaranteed. Counsel also abandoned the earlier complaints regarding the dependency ratio as the same had been amended to $\frac{1}{3}$ in the addendum dated 9th September 2016. He persuaded the court to allow the appeal.

10. The respondent in her submissions beseeched the court to find that the trial court's decision was just and sound in law and ought not to be disturbed. She invited the court to dismiss the appeal with costs.

11. Having considered the grounds of appeal and the parties' submissions, I find that the only issue that arises for my determination is whether the learned trial magistrate erred in adopting a multiplier of 32 years when assessing damages for loss of dependency under the *Fatal Accidents Act* considering that the multiplicand of KShs.15,000 and dependency ratio of $\frac{1}{3}$ are not contested.

12. Before embarking on the task of resolving this issue, I think it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with an award of damages made by the trial court. It is now settled law that in order to interfere with an award of damages, the appellate court must be satisfied that in assessing the damages, the trial court took into account irrelevant factors or failed to consider relevant facts or that the amount awarded was so inordinately low or high that it must have been an erroneous estimate of the damage suffered. The court can also interfere with an award of damages if it is clear that the trial court misapplied the evidence before it or proceeded on wrong legal principles. See **Butt V Khan, [1977] 1 KAR; Shabani V City Council of Nairobi, [1985] KLR 516.**

13. I have considered the plaintiff's testimony in the trial court. It confirms that the deceased was not married and she did not have children. Though the plaintiff claimed that she was the deceased's dependant, she did not specify the kind of support she allegedly received from the deceased prior to her untimely death. In the circumstances, I find no reason to disturb the dependency ratio of $\frac{1}{3}$ which was used by the trial court and the same is hereby maintained.

14. Regarding the multiplier, it is not disputed that the deceased was 28 years old at the time of her demise. In arriving at the multiplier of 32 years, the learned trial magistrate considered the deceased's age; the fact that she was in good health prior to the accident and the retirement age of 60 years. She appears to have been persuaded that had everything remained constant, the deceased would have worked till she reached retirement age.

15. I have read the authorities relied upon by the appellant in this appeal to persuade the court find that the multiplier of 32 years adopted by the trial court in calculating damages for loss of dependency was too high. I have noted that the deceased persons in those cases namely, **Simeon Kiplimo Murey & 3 Others V Kenya Bus Management Limited & 4 Others, [2014] eKLR** and **Charles Masoso Barosa & Another v Chepkoech Rotich & Another, [2014] eKLR** were also 28 years old at the time of their death and a multiplier of 12 and 15 years respectively was adopted by the High Court in determining loss of dependency. However, those cases are distinguishable from the present case since the facts that informed the court's decision on the multiplier applicable in each case were different from the facts in the respondent's case.

In any event, dependency is a question of fact and the extent of dependency must be determined on the facts and circumstances of each case.

16. I however agree with the appellant's counsels' submission that the learned trial magistrate ought to have taken into account the exigencies of life when deciding on the multiplier because if truth be told, life is never predictable. This reality is an important factor which the trial court ought to have considered in settling for the multiplier to use in the respondent's case but it is a fact which apparently escaped the learned trial magistrate's attention.

17. On my part, considering the vicissitudes of life, I find that a multiplier of 30 years would be reasonable in the circumstances of this case. I therefore set aside the multiplier of 32 years adopted by the trial court and substitute it with a multiplier of 30 years.

Consequently, the general damages for loss of dependency will work out as follows:

$$15,000 \times 12 \times 30 \times \frac{1}{3} = 1,800,000$$

The award of KShs.1,920,000 as damages for loss of dependency is consequently set aside and is substituted with an award of

KShs.1,800,000.

18. As the award for loss of dependency was the only one which was contested in this appeal, the awards made in the various heads under the *Law Reform Act* will remain undisturbed.

19. For the foregoing reasons, I find merit in the appeal and it is hereby allowed. The judgment of the trial court is set aside and is substituted with a judgment for the respondent against the appellant in the total sum of KShs. 1,880,000 which shall be subject to the apportionment of liability agreed upon by the parties. The amount shall attract interest at court rates from the date of judgment of the lower court until payment in full.

20. On costs, the appellant shall bear the respondent's costs in the lower court but each party shall bear his or her own costs of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 18th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kamau holding brief for Mr. Onyinkwa for the appellant

Ms Awino for the respondent

Mr Fidel: Court Assistant