



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.112 OF 2014

ALICE WATETU KAMANGU (Suing as the

personal representative of **PETER**

KABUGA NDIRANGU(DECEASED).....APPELLANT

-VERSUS-

ZACHARIA WACHIRA GATIGA.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.S. Mungai Chief Magistrate delivered on 2nd July 2014)

JUDGMENT

1. This appeal is against the *quantum* of damages awarded to the estate of the deceased by the lower court by its judgment dated 2nd July 2014.

The main grievance is that the trial court erred in law and fact in its finding that dependancy can only be claimed and awarded by persons who are administrators of the deceased's estate, and as the deceased parents were not administrators, they could not be considered as dependants. It is a further ground that the trial Magistrate erred in disallowing pleaded and proved special damages.

2. The duty of an appellate court is well defined. It is to reconsider and re-evaluate the totality of evidence adduced before the trial and come up with its own findings and conclusions, taking into consideration that it neither heard or saw the witnesses testify. It is not bound to agree with the trial courts findings of fact – **Kenya Ports Authority -vs- Kuston (Kenya) Ltd (2009) EA 212**.

3. On the matter of awards of damages, the court shall be slow in disturbing such award unless it is satisfied that the court took into account irrelevant factors or failed to consider a relevant factor, or that, in its opinion, the award is inordinately high or so low as to be a wholly erroneous estimate of estimate of damages – **Kemfro Africa Ltd t/a Meru Express services & Another -vs- A.M. Lubia and Another (1998) e KLR**. See also **Bashir Ahmed Butt -vs- Uwais Ahmed Ahmed Khan(1982-88) KARS**.

4. Under the **Law of Succession Act, Cap 60**, Dependants of a deceased person are stated on priority basis as:

***“Section 4(i) Every action brought by virtue of the provisions of this act shall be for the benefit of the wife husband parent and child of the person whose death was caused and shall be brought by and in the name of the executor or administrator of the deceased---*”(emphasis mine).**

5. From the above, it is evident that parents of a deceased person take priority when the deceased is unmarried and has no children.

The action for damages ought to be brought by an administrator or an executor. Such persons do not have to be the parents or relatives of the deceased. Any person with some interest in the estate, but for the benefit of the dependants Section 4(1)- can be appointed as the administrator or an executor, and not necessarily a person from the family or relative.

6. In the case **Rahab Wanjiru Nderitu -vs- Daniel Muteti and 4 Others (2016) e KLR, Nakuru HCCC No. 526/2000**, the court (Mulwa J) held:

“that any person who has a beneficial or other interest in a deceased estate may apply for grant of Letters of administration...”

7. However, a party claiming an award of damages as a dependant must prove that indeed they are dependants. Such proof must not always

be by documentary evidence, say by marriage a certificate or birth certificate. Any other acceptable manner, like a letter from the local administration chief, district officer, or school are acceptable – See **Rahab Wanjiru** Case above.

8. In the Plaintiff dated 27th July 2011, particulars pursuant to the Fatal Accidents Act are stated as the plaintiff, being sister to the deceased as well as the two parents of the deceased being 77 and 76 years old.

Letters of administration were issued to the plaintiff by the court of the 11th June 2010 (Emukule J).

9. The Respondents/defendants in the primary suit did not deny the particulars of dependency in their statement to defence dated 21st April 2012.

10. I have considered the Judgment of the trial magistrate and especially where he stated on Page 106.

“If the parents were directly depending on the deceased then the plaintiff ought to have co-joined at least one of them as the legal representative and by extension a co-plaintiff in this suit---”

11. Having rendered above as to who is a dependant and when damages ought to be awarded to parents of a deceased person, It is evident that the trial magistrate misapprehended the law in very material aspects, and more so as to the application of **Section 4(1)** of the **Fatal Accidents Act** as well as **Section 26 of the Law of Succession Act**.

12. I therefore agree with the appellants submission that the trial magistrate erred in law and fact in concluding that the appellant was not entitled to damages for loss of dependency. That ground of appeal succeeds. - **Joseph Wachira Maina -vs- Mohamed Hassan (2006) e KLR**.

13. Upon the above finding, it is my duty to consider what damages are awardable to the dependants, the plaintiff and the deceased's elderly parents as stated in the plaintiff.

14. Evidence was tendered that the deceased used Kshs.5,000/= for upkeep of his parents from his hawking business though the income was not documented but placed at Kshs.5,000/= per month. The trial court in its judgment captured the parties proposals on loss of dependency. The appellant put forth an income of Kshs.5,000/= and a multiplier of 25 years against a multiplicand of $\frac{1}{3}$.

15. The Respondent proposed an income of Kshs.3,000/= against a multiplier of 15 years and $\frac{1}{3}$ multiplicand. Each supported their proposal with authorities. I have considered the proposals.

16. There was no documentary proof of income, the deceased having been a hawker. It has been held in numerous decisions that documentary evidence is not the only method to prove income as many people do not have formal employment nor do they record their incomes in the informal sector - **Ayiga Maruja & Another -vs- Simeon Obayo CA C.A No. 167/2002 (2005) e KLR**.

That does not mean that they do not earn an income as they ably support their families, paying school fees and taking care of other financial obligations to their families.

17. The deceased died at 33 years on the 13th October 2008. The Government minimum wages guidelines may give a clue as to what should be a reasonable income. I shall adopt Kshs.5,000/= as the wages per month - as a fair and reasonable income.

Save for uncertainties of life the deceased could have had a healthy working life of over 40 years – no risks in the type of work nor no ill health were mentioned.

18. In **HCCC NO. 186/2011 (Nakuru) Stella Nasimiyu Wangila and Another -vs- Rephael Oduor Wanyamah (2016)**, the court adopted 15 years multiplier, guided by **Kangubiri Girls High School and Another -vs- Jane Wanjiru (2014) e KLR** for a deceased who was 33 years.

In **Civil case 2152 of 2000 Doris Nyaguthi Muhindi -vs- Kairuki Karanu Kojo & Another (2007) e KLR**, the court allowed a multiplier of 15 years for a 38 years deceased.

19. Times and circumstances have changed. Inflation has gone up, and the Kenyan currency has lost ground against other currencies.

Taking into account the above, I am persuaded that multiplier of 20 years would be more reasonable. I shall also adopt a multiplicand of $\frac{1}{3}$ as proposed by both parties.

Thus loss of dependency works out as

$$5,000 \times 12 \times 20 \times \frac{1}{3} = 400,000/=.$$

The appellant has no grievance with the award by the trial court under the Law Reform Act. It is upheld.

19. On **special damages**, I have considered the sum pleaded as Kshs.52,000/= all being funeral expenses. I have also seen receipts in support.

Even if there were no receipts in support of the very moderate funeral expenses, and as expressed in numerous judicial decisions, such award would not have been denied for lack of production of receipts. **Abdalla Rubeya Hemed -vs- Kajuma Mvurya & Another (2017) e KLR**. I however agree with the trial court that there was no justification to seek reimbursement for the two vehicles used to carry mourners to the burial site.

To the Kshs.33,000/= allowed, I further allow Kshs.1,500/= being court fees for obtaining letters of administration as such expense was incurred due to the accident. Special damages are therefore enhanced to **Kshs.48,100/=**.

20. The Upshot is that the appeal is allowed and damages adjusted as follows:

Damages for:

a) Pain and Suffering - Kshs. 30,000/= upheld

b) Loss of expectation of life - Kshs.120,000/= upheld

c) Special damages - Kshs. 48,100/= enhanced

d) Loss of dependency - Kshs.400,000/= awarded

21. Interest on the above awards under (a), (b) and (d) shall accrue at court rates from the date of the trial court judgment.

Interest on special damages (c) above shall accrue from date of filing of the primary suit.

22. Costs of the appeal are awarded to the appellant.

Orders accordingly.

Dated, signed and delivered this 28th Day of November 2018

JANET MULWA

JUDGE