



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.106 OF 2014

DOMINIC KIONGERAH(Suing as the legal administrator of the Estate of the Late **MAGDALINE NJERI KIONGERAH**).....**APPELLANT**

-VERSUS-

ZACHARIA WACHIRA GATIGA.....**1ST RESPONDENT**

LAWRENCE MAINA GATIGA.....**2ND RESPONDENT**

(An Appeal from the judgment of the Chief Magistrate's Court at Nakuru CMCC No.321 of 2010 – Dominic Kiongerah (suing as the personal representative of Magdaline Njeri Kiongerah -vs- Zacharia Wachira Gatiga & Another (Hon. S. Mungai CM) delivered on 18th June 2014)

JUDGMENT

1. This appeal is against the trial court's awards on **quantum** of **damages** following a fatal accident where the deceased a twenty-three(23) years old female was fatally injured.

Upon full hearing, the Estate of the deceased was awarded the following damages under the Law Reform Act and the Fatal Accidents Act.

- **Pain and suffering** - **Kshs.10,000/=**
- **Loss of expectation of life** - **Kshs.80,000/=**
- **Loss of dependency** - **Kshs.900,000/=**
- **Special damages** - **Kshs.10,000/=**
- **Less agreed contributory negligence at 85% in favour of the estate.**

2. The main dispute is that the above awards are inordinately too low and this court has been urged to set the awards aside and re-assess the **quantum** payable.

3. This is the first appellate court. It is trite that the court can only interfere with a trial courts assessment of damages if it is persuaded that the trial court either took into account an irrelevant factor or that the award is manifestly too high or low as to be an erroneous estimate or is based on no evidence – **Kemfro Africa Ltd t/a Meru Express & Another -vs- A.M. Lubia & Another (1982-88) KAR 727**.

4. Under the Law Reform Act Cap 26 Laws of Kenya, damages are sought for the benefit of the deceaseds Estate, under sub heads, Pain and Suffering, and Loss of Expectation of life.

Under the Fatal Accidents Act Cap 32 Laws of Kenya damages are awardable for the benefit of the deceased's dependents. **Section 8 of the Act** demands that full particulars of the dependents must be stated and the nature of damages sought. It is purely a question of fact, and such dependency ought to be proved - **Gerald Mbale Mwea -vs- Kariko Kihara & Another C.A No. 112 of 1995**.

5. In his plaint dated the 30th March 2010, the appellant being the personal representative of the estate, other than stating that he had invested a lot in educating the deceased, a 23 year old who had completed her diploma in journalism and media studies, failed to give particulars of any dependants to the deceased in line with **Section 8 of the Fatal Accidents Act**.

6. I agree with the trial Magistrates finding that:

“As pointed out by the Defendant no dependent was named in the pleadings and evidence tendered is clear that the deceased who was job hunting was solely depending on her parents.”

7. As stated in the case **Sheikh Mushtag Hassan -vs- Transporters & Others (1986) e KLR**, parents holds very high expectations from their children to come to their aid when adults, a fact held high in the African culture, Kenya not excluded, hence the holding by **Nyarangi J** that:

“In general in Kenya children are expected to provide and do provide for their parents when they are in a position to do so and to the extent of their abilities.”

That in my view forms the need of parents toiling in difficult circumstances to offer the best education to their children to prepare them for job and business opportunities.

8. The appellant had done so by educating the deceased. I agree with the appellant's submissions that the trial courts contemptuous remarks about custom of the people was unwarranted and out of place and contrary to **Section 3(1) of the Judicature Act, Cap 8**.

Notwithstanding, did the said comments affect the trial magistrates assessment of damages?

I have considered and re-evaluated the evidence tendered as well as the judgment delivered on the 18th June 2014.

9. Under the Law Reform Act.

There is no dispute that the deceased died immediately after the accident. I am satisfied that the sum of Kshs.10,000/= awarded for pain and suffering is sufficient, as well as the damages for loss of expectation of life. I have not been told in what manner the trial court failed to adhere to the legal principles governing such awards – See **Samuel Mwangi Wainaina and Another -vs- Virginia Nungari Kimani (2016)**, that generally nominal damages are awarded if death follows immediately after the accident. I am also satisfied that the award of Kshs.80,000/= for loss of expectation of life is not too low as to invite this court's interference. It is well within the conventional awards – **HCCA No. 43 of 2013 David Kahuruka Gitau & Another -s- Nancy Ann Waithithi Gitau (2016) e KLR**.

These awards are upheld.

10. Damages under the Fatal Accidents Act, Cap 32 Laws of Kenya

I have stated above that the appellant failed to state and give full particulars of the deceased's dependants contrary to **Section 8 of the Act**. In **Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others Milimani HCCC No. 1243 of 2001**, and cited in **David Kahuruka Gitau** above, a party is bound by its pleadings, and its evidence in support of its case. The trial magistrate guided by the evidence adduced nevertheless assessed damages under the subhead “Lost years.”

11. The deceased was not in any gainful employment, but job hunting, with a Diploma in her hands.

PW2, a journalist of thirteen years experience testified that as a freelancer he earned between Kshs.25,000 to 30,000/= per month depending on the media house one worked for, coupled with relevant experience.

12. Factoring uncertainties of life, and relevant authorities adopted and expected income - the trial magistrate, by speculation - opined that a global figure would suffice in the circumstances, in the sum of Kshs.900,000/=.

This in my view was within the trial court's discretion as no sufficient facts were established to enable the court to avoid speculation, there having been no mathematical certainty.

13. But was the learned trial magistrate's discretion exercised judiciously and with reason?

The principles in the assessment of damages were clearly stated in **Beatrice Wangui Thairu -vs- Hon. Ezekiel Bargetuny and Another Nbi HCCC No. 1638 of 1988**, that the court must find out the value of the annual dependency, the multiplicand, informed by net annual earnings multiplied with the years of expected earning life – multiplier and chances of the deceased's dependants lifespan.

14. The other method is the global approach where no certain income could be provided, and in which case the holding in **Hassan -vs- Nallian Mwangi Kamau Transporters and 4 Others (1986) KLR 457** was **applied**. The court rendered

“That the court has to make the best estimate it can, based on the known facts and the prospects of the deceased at the time of his death.” See also

Transpares Kenya Ltd and Another -vs- SMM (Suing as legal representative for and on behalf of the Estate of EMM (deceased) (2015) e KLR.

15. It is trite too that a court of law will not award damages to a claimant because it is sympathetic to him due to the injury.

In this case, there were no named dependants, save that the plaintiff in the primary suit was the deceased's father, who told the court how he invested in the deceased. In my considered view, a legal personal representative of a deceased estate may not necessarily be a dependant. A dependant ought to be specified, with full details. However, I hold the view that a parent whether stated or not is an automatic dependant in case of a loss of child so is a child, despite provisions of **Section 8 of the of the Fatal Accidents Act**, regard to **Article 159 (2) (d) of the Constitution of Kenya 2010**, and common sense.

16. The deceased having completed Diploma Studies in Journalism, she no doubt had a bright future and was job hunting. Though not supporting her parents at the time of death possibility of doing so in future can not be ignored.

In that regard, and having called an expert who gave an opinion on what a journalist (diploma level) would be earning, I opine that the global approach adopted by the trial court on assessment to damages not to have been the proper method to adopt, and that goes for the global award of Kshs.900,000/= which I hold to be too low in the circumstances. I am persuaded to disturb the award.

17. The deceased was twenty three(23) years old. She would have had a fruitful working life of over 37 years save for uncertainties of life. At a moderate income of Kshs.30,000/=, against a multiplier of 30 years against a multiplicand of $\frac{1}{3}$, loss of dependency would be

$$30,000 \times 12 \times 30 \times \frac{1}{3} = 3,600,000/=$$

That is the award I find fair and reasonable.

18. Consequently, I set aside the global award of damages for lost years of Kshs.900,000/= and substitute the same with an award of Kshs.3,600,000/=, less 15% contributory negligence - as agreed by the parties. Thus, the appeal succeeds in respect of the award on lost years. The revised awards are as follows:

a) Loss of expectation of life	-	Kshs.80,000/=
b) Pain and suffering	-	Kshs.10,000/=
c) Loss of dependency	-	Kshs.3,600,000/=
d) Special damages	-	<u>10,000/=</u>
Total		Kshs.3,700,000/=
85% thereof		<u>Kshs. 3,145,000/=</u>

19. The sum of Kshs.3,145,000/= shall accrue interest from the date of the trial court's judgment.

20. The appellant is awarded costs of the appeal.

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

J.N. MULWA

JUDGE