



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 17 OF 2018

(FORMERLY MOMBASA CIVIL APPEAL NO. 152 OF 2017)

FRANCO MWIRIGI.....APPELLANT

Versus

PATRICK MUSYOKI MUNYWOKI &

DUNCAN MBOLE MUNYOKI (suing on behalf of the estate of

Maurice Wambua – Deceased.....RESPONDENTS

(An Appeal from the Judgement delivered on 26th July, 2017 by Nathan S. Lutta, SPM in Mariakani SPM Court Civil Case No. 446 of 2016)

JUDGEMENT

1. This appeal arises from the judgement delivered in Mariakani Senior Principal Magistrate's Court Civil Case No. 446 of 2016 in which the respondents, Patrick Musyoki Munyoki and Duncan Mbole Munyoki, suing on behalf of the estate of the deceased Maurice Wambua, were awarded damages amounting to Kshs.3,405,300 against the Appellant, Franco Mwirigi, as compensation as a result of the fatal injuries sustained by the deceased in an accident involving the Appellant's motor vehicle registration number KBU 297X.
2. A perusal of the memorandum of appeal discloses that this appeal is limited to amount of damages awarded. The determination of the liability of the Appellant at 100% will therefore not be disturbed. Indeed the deceased being a passenger in the fated vehicle could not have played any role in the occurrence of the accident.
3. The advocates for the parties agreed to have the matter proceed by way of written submissions.
4. On the award of Kshs. 3,120,000 under the head of loss of dependency, counsel for the Appellant urged the court to find that the award ought to have been based on a ratio of 1/3 and not 2/3 as decided by the court since the wife of the deceased was not availed as a witness and neither were the children's birth certificates produced as exhibits. In the opinion of the Appellant there is no evidence that the deceased was married.
5. It is also submitted for the Appellant that the deceased was the youngest of his brothers and none of his sisters was going to school meaning that they were not dependent on him. Another point is that the

only dependant of the deceased was his mother but it should be noted that she had other children to take care of her.

6. The court is urged to find that the trial court erred in calculating the loss of dependency based on a 2/3 ratio and should on that basis interfere with the award.

7. As for the earnings of the deceased, counsel for the Appellant submitted that the Appellant had proposed Kshs. 10,000 as the monthly earnings of the deceased but this was disregarded without any explanation in favour of the figure of Kshs.13,000 proposed by the respondents. In the Appellant's view the figure he had proposed was reasonable and it was therefore unjust to adopt the multiplier proposed by the respondents.

8. On the multiplicand of 30 years adopted by the trial court, the Appellant submits that in selecting a multiplicand to use, the court ought to take into account the nature of work of the deceased person and the vagaries of life. It is the Appellant's case that the trial court erred in finding that the deceased who was 30 years old would have worked for 30 years until his retirement at 60 years. The Appellant urges this court to find that a life expectancy of 18 years, as it had proposed at the trial court, is more reasonable.

9. It is the Appellant's position that the trial magistrate applied the wrong principles in arriving at the award for loss of dependency. He urged this court to upset the award. As for the principles regulating the powers of this court in determining whether to interfere with an award of damages, the Appellant referred the court to the decisions in **Butt v Khan (1982-88) 1KAR 1** and **Civil Appeal No. 59 of 2015 Sino Hydro Corporation v Daniela Atela Kamunda**.

10. Turning to the award of Kshs. 30,000 for pain and suffering, the Appellant asks this court to reduce the same to Kshs. 20,000 stating that the deceased died one hour after the accident. In the Appellant's view, the award of Kshs. 30,000 for pain and suffering was manifestly high necessitating the court's interference with the same.

11. Finally, the Appellant attacks the award of Kshs. 150,000 as compensation for loss of expectation of life asserting that the conventional award made by the courts on this head is Kshs. 100,000. He urges the court to find that this award was inordinately high.

12. The Appellant concluded by urging this court to agree with him that the trial court had applied the wrong principles in making the award resulting an inordinately high and erroneous award. He thus urges this court to allow his appeal.

13. In opposing the appeal, the respondents submit that the evidence adduced established that the deceased was married with two children and was survived by his mother. It is asserted that a letter from the chief was produced giving the names of the wife and the children of the deceased. According to the respondents, the evidence adduced satisfied the requirements of Section 4 of the Fatal Accidents Act as even one child and a wife is sufficient to attract a ratio of 2/3. It is therefore the respondents' case that the Appellant has not established that the trial court fell into error in adopting a ratio of 2/3 or why this court sitting on appeal should fault the decision of the trial court.

14. As for the earnings of the deceased, the respondents submit that uncontroverted evidence was adduced to show that the deceased earned Kshs. 2,500 per day translating to Kshs. 75,000 per month. The respondents assert that despite this evidence they had nevertheless proposed earnings of Kshs. 13,201.55 per month based on both the evidence and the minimum statutory wages. In the respondents' view the decision by the trial court to use a multiplicand of Kshs. 13,000 was not erroneous.

15. As for the multiplier of 30 years, the respondents contend that the Appellant had plucked a multiplier of 18 years from the air as the same was not supported by any evidence. Urging this court to find that the trial court did not err in using a multiplier of 30 years, the respondents assert that they had pleaded that the deceased was a strong and healthy person in the boda boda business. Further, that they had submitted that the deceased would have worked past 60 years taking into account that he was self-employed. The

respondents submit that it is clear that the trial court did not fall into any error of law and neither was there any misapprehension of the evidence and the submissions before the trial court.

16. According to the respondents, the allegations of risks associated with riding a motorcycle were not placed before the trial court either by way of pleadings or submissions.

17. On the award of Kshs. 30,000 for pain and suffering, the respondents state that they had relied on the decision in **HCCC No. 357 of 1999** to urge the court to make such an award unlike the Appellant who asked that Kshs. 20,000 be awarded on this head without citing any authority in support of the figure.

18. The respondents further submit on this issue that the evidence on record is that the deceased sustained serious injuries at Bonje in Kilifi County and died several hours later while undergoing treatment at the Coast Provincial General Hospital in Mombasa.

19. On the award for loss of expectation of life, the respondents state that the Appellant merely alleged before the trial court, without more, that a conventional figure of Kshs. 100,000 should be awarded. They submit that on their part they had requested the court for an award of Kshs. 150,000 anchored on **HCCC No. 61** (full citation not provided) and **HCCC No. 437 of 1996** where the respective sum of Kshs. 180,000 and Kshs. 150,000 had been awarded in comparable cases.

20. In conclusion they wonder how the trial magistrate can be faulted for making a judgement based on evidence and cited authorities. They therefore urge this court to dismiss the appeal with costs.

21. This being a first appeal, the duty of this court is to look at the evidence afresh in order to reach its own independent conclusion. This statement finds support in the decision of the Court of Appeal in **Mwana Sokoni v Kenya Business Limited (1985) KLR 931**, as cited by the same Court in **Abok James Odera T/A A.J. Odera & Associates v John Patrick Michira T/A Michira & Co. Associates [2013] eKLR**, where it was stated that:

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohoid, the Times, March 16, 1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed by the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally important what was not said.”

22. The evidence adduced in support of the amount of damages that was prayed for is that of one of the respondents, Patrick Musyoki Munywoki who testified as PW2. His evidence was to the effect that together with his co-respondent Duncan Munywoki they were the administrators of the estate of the deceased Maurice Wambua Munywoki who was their brother. He stated that the deceased was aged 30 years and a motorcycle operator earning Kshs. 2,500 per day. He produced documents showing that the deceased indeed owned a motorcycle. He further stated that the deceased used to support his family made up of a wife and two children aged 5 and 3 years respectively. He produced a letter from the chief in support of this fact.

23. Cross-examined, PW2 stated that the deceased was his brother. He was a boda boda operator earning Kshs. 2,500 but he had no documentation to confirm the earnings. He also testified that the deceased used to support him, his family and their mother.

24. The Appellant has queried how the trial court arrived at the figure of Kshs. 13,000 as the deceased's monthly earnings. The evidence on record established that the deceased was a boda boda operator. Whereas there was no documentary evidence to show that he earned Kshs. 2,500 per day, it cannot be

said that he was running a charitable organization. He must have been earning something from what he was doing.

25. In the submissions filed before the trial court, the respondents had asked the court, to adopt earnings of Kshs. 13,201.55 per month **“being wages of a driver under the minimum Statutory Wage of 2013 as the two businesses fairly relate to ferrying passengers from one point to another.”**

26. On his part, the Appellant had submitted that the respondents had not produced any documentary evidence in support of their claim that the deceased was earning Kshs. 2,500 per day. He then went ahead and submitted that **“[i]n the absence of any documentary and credible evidence in respect of the earnings of the deceased, we would submit that a monthly wage of Shs. 10,000.00 be adopted for the purposes of assessing damages under this head.”**

27. In light of the evidence and submissions placed before the trial court, it cannot be said that the trial court erred in picking a figure of Kshs. 13,000 as the most likely to be representative of the deceased’s earnings. The magistrate may not have given reasons for his decision but there is ample evidence on record that he reached the correct decision. He cannot be faulted for holding that the deceased was earning Kshs. 13,000 per month.

28. As for the selection of the multiplier, it is not disputed that the deceased was 30 years old when he died. It was submitted by the respondents that the deceased was likely to retire at 60 years as he was self-employed.

29. In his submission on this issue before the trial court, the Appellant simply stated that a multiplier of 30 years was high and proposed a multiplier of 18 years.

30. It was the duty of the trial court to weigh the evidence and the submissions of both sides and reach a just decision. In light of the averment in the plaint that the deceased was a **“strong, brilliant, healthy, talented young man”** aged 30 years with **“an extended life expectancy”** and the persuasive submissions, the trial court had reason to ratchet up the multiplier for lost years as proposed by the respondents. It cannot indeed be doubted that all things being equal, the deceased had a long life ahead of him. However, life is not predictable. The unpredictability of life should be taken into account in picking a multiplier. Taking the vagaries of life into account, I find that a multiplier of 30 years was on the higher side. It is not stated in the judgement of the trial court why 30 years and not 18 years was picked as the multiplier.

31. In **Kitavi v Coastal bottlers Limited, Civil Appeal No. 69 of 1984**, the Court of Appeal stated that:

“The Court of Appeal of Kenya, then should, as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.”

32. Even though the evidence established that the deceased was in good health at the time of the accident, it cannot be ruled out that he could have died of other causes shortly thereafter had he not died in the accident.

33. In my view, the trial magistrate failed to take into account this factor in picking the multiplier of 30 years. This was an error and this court as an appellate court is allowed to interfere with the award. I will in the circumstances of this case substitute the multiplier of 30 years with one of 20 years.

34. On the question of the ratio of 2/3 used by the trial court, the evidence on record shows that the deceased supported his wife, children and mother. There was no evidence adduced by the Appellant to show that the deceased used less than 2/3 of his earnings as support for his dependants. The trial magistrate cannot therefore be faulted for using the 2/3 ratio. In the circumstances, the award should work out as follows:

$$2/3 \times 13,000 \times 20 \times 12 = 2,080,000.$$

35. As clearly pointed out by the respondents, the award of Kshs. 30,000 for pain and suffering and Kshs. 150,000 for loss of expectation of life were backed by decided cases that had been cited before the trial court. In making the awards, the trial magistrate was guided by the authorities that had been cited before him. He therefore did not make any mistake. The appeal in regard to the awards for pain and suffering, and loss of expectation of life therefore fail.

36. For the record, there was no appeal against the award for special damages. This award will therefore not be disturbed.

37. This appeal partially succeeds as hereinabove stated. The award of general damages will now read as follows:

<u>Award</u>	<u>Kshs.</u>
a) Pain and suffering.....	30,000
b) Loss of expectation of life.....	150,000
c) Special damages.....	105,300
d) Loss of dependency.....	<u>2,080,000</u>
Total.....	2,365,300

38. Owing to the partial success, the Appellant will have 1/3 costs of the appeal. The respondents will however retain the full costs of the trial based on the award as adjusted in this appeal.

39. Finally, it is noted that this is a matter that is brought for the benefit of the dependants of the deceased. Those dependants are clearly specified in Section 4 of the Fatal Accidents Act, Cap. 32. It is therefore important that the damages awarded benefit those dependants. I therefore direct that 50% of the award shall be deposited in an interest earning account to be operated for the benefit of the deceased's two children Marion Wambua and Mweni Wambua. The account shall be opened in a reputable bank and shall be operated by the Deputy Registrar of this court and Mutheu Wambua, the wife of the deceased. The balance of 50% shall be equally split between Agnes Mbithe, the mother of the deceased and Mutheu Wambua, the wife of the deceased. For avoidance of doubt, each one of them will get 25% of the award. The respondents' counsel is mandated to ensure compliance with the court's directions.

Dated, signed and delivered at Malindi this 28th day of November, 2018

W. KORIR,

JUDGE OF THE HIGH COURT