



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 111 OF 2014

TOBIAS ODOYO OBURU.....1ST APPELLANT

MARY NJUGUNA WANGARI.....2ND APPELLANT

VERSUS

NORAH B. MOSONI & ANOTHER (Suing as legal representative of the estate of

NAHASHON OMAR MOSOMI).....RESPONDENTS

(Being an Appeal from the Judgment and Decree of the Honourable Njoroge

in KISII CMCC NO. 363 OF 2012 delivered on 08/09/2014)

JUDGMENT

1. The case against the appellants in the subordinate court was that on 2nd May 2012, the deceased was driving motor vehicle Registration mark KAZ 656 Z along Kisii-Kilgoris road, near Mwembe when the 1st Appellant or his servant recklessly drove KAH 254A and caused a collision with motor vehicle KAZ 884S which was also being driven recklessly by the 2nd Appellant or his agent and knocked the vehicle driven by the deceased. The deceased sustained fatal injuries. As a result of his death, the respondents claimed damages from the appellants under the Law Reform Act (Chapter 26 of the Laws of Kenya) and Fatal Accidents Act (Chapter 32 of the Laws of Kenya). The issue of liability was settled by consent and was apportioned in the ratio of at 80:20 against the appellant. The trial magistrate made the following award of damages:

Pain and Suffering Kshs. 20,000/-

Loss of expectation of life Kshs.100,000/-

Loss of Dependency Kshs. 2,160,000/-

Funeral Expenses Kshs. 30,000/-

Total Kshs. 2,310,000/-

Less 20% Kshs. 462,000/-

Total Net Kshs. 1,848,000/-

2. The appellant's contests the trial magistrate's finding on quantum. As this is an appeal on the quantum of damages, I must keep in mind the general principle upon which this Court, as an appellate court, can interfere with an award of damages. In ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***, the Court of Appeal held as follows;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

3. The thrust of the appellant's case as set out in the memorandum of appeal and oral submissions is that the trial magistrate failed to consider the evidence and submissions filed by the Appellants. The appellants further contended that the trial magistrate failed to apply the principles applicable in awarding quantum of damages thereby awarding a sum in respect of damages which was inordinately high. Counsel for the Appellants submitted that there was no evidence/proof of the deceased's earnings.

4. To support the claim, the deceased's wife, Norah Bosibori Mosomi (PW 1) testified that the deceased had dependants and was earning Kshs. 25,000/- to support the family. The death certificate produced in court showed that the deceased was 37 years at the time of his death. Counsel for the Respondents submitted that the court should not disturb the award by the trial magistrate court.

5. The trial magistrate found that there was no proof of income tabled before court and adopted a sum of Kshs 15,000/- as an adequate monthly income. The *Court of Appeal in Jacob Ayiga Maruja & Another v Simeone Obayo KSM CA Civil Appeal No. 167 of 2002 [2005]eKLR* observed that, "We do not subscribe to the view that the only way of proving earnings is equally the production of documents." PW 1 testified on oath that the deceased was a driver and that he in fact died while in the cause of duty being paid Kshs 25,000/-. I agree with the finding of the trial magistrate that the sum of Kshs 15,000/- was reasonable noting that the Regulation of Wages (General) (Amendment) Order 2012 sets the salary of a driver at Kshs 18,219.30 and a multiplicand of Kshs 15,000/- was therefore reasonable in the circumstances.

6. As regards the multiplier, the deceased was aged 37 years. The trial magistrate noted that the deceased had 23 years to work if he would have retired at the age of 60 years. The Appellant submitted that 12 years would have been the appropriate multiplier. The Court of Appeal in *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR* held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In *Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004]eKLR* the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the trial magistrate court considered the impedances of life and reduced the multiplier to 20 years. I do not think three years deducted off the retirement age reflects the life expectancy, normal vagaries of life which the deceased would be subjected to. I find that a term of 18 years as a multiplier would be most appropriate.

7. Determination of the applicable dependency ratio is a question of fact (*see Boru v Onduu [1982 -1992]2 KAR 288*). The respondent pleaded that the deceased had a wife and children at paragraph 6 of the plaint. A plaintiff is required to plead the dependants under section 4 of the Fatal Accidents Act. Therefore the dependency ratio of two-thirds (2/3) is reasonable in light of the evidence adduced.

8. However, I note that the trial magistrate erred when calculating loss of dependency. The correct calculation ought to be as follows: $15,000 \times 12 \times 20 \times \frac{2}{3} = 2,400,000/=$. Having found the multiplier of 18 to be more appropriate I set aside the award on damages for loss of dependency and substitute it with an award of Kshs 2,160,000/- i.e. $(15,000 \times 12 \times 18 \times \frac{2}{3})$ less 20% it reduced to Kshs.1, 728,000. I will not disturb the award damages in respect to pain and suffering, loss of expectation of life and funeral expenses as awarded by the trial magistrate. Interest shall be from the time of judgment. Each party to bear its own costs.

Dated and delivered at Kisii this 18th day of December 2018.

R.E. OUGO

JUDGE

In the presence of;

Mr. Godia h/b Mr. Mbeka For the Appellant

Respondent Absent

Mr. Omwoyo Court clerk