



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 91 OF 2015

ERIC NYALE1ST APPELLANT
SEIF MZUNGU MAGOYO2ND APPELLANT

VERSUS

MWANAMVUA MUSA MWANYUMBA

(Suing as the Mother and Administrator of the estate of the late Musa Ali Mwarindano)
.....RESPONDENT

(An appeal from the judgment of Hon. Kitagwa Resident Magistrate, in CMCC No. 2614 of 2011
delivered on 7th August, 2014)

CONSOLIDATED WITH

MOMBASA HIGH COURT CIVIL APPEAL NO. 92 OF 2015

ERIC NYALE1ST APPELLANT
SEIF MZUNGU MAGOYO2ND APPELLANT

VERSUS

SINIA KAMAU

(Suing as the Mother and Administrator of the estate of the late Mwania Kamau)
.....RESPONDENT

(An appeal from the judgment of Hon. Kitagwa, Resident Magistrate in CMCC No. 2614 of 2011,
delivered on 7th August, 2014)

JUDGMENT

1. The appeals herein were consolidated on 28th March, 2017, with the lead file being Mombasa High Court Civil Appeal No. 91 of 2015. The appellants had filed separate memoranda of appeal on 8th July, 2015. The first 3 grounds of appeal are similar namely:-

(i) That the Learned trial Magistrate erred in law and in fact by computing an award for loss of dependency which was manifestly too high and excessive;

(ii) That the Learned trial Magistrate erred in law and in fact by computing liability apportionment which was manifestly too high and excessive;

(iii) That the Learned trial Magistrate erred in law and in applying wrong principles while assessing general damages under the Law Reform and Fatal Accidents Act and the decision therein being exorbitantly high and excessive in the circumstances.

2. In Mombasa High Court Civil Appeal No. 91 of 2015, the 4th ground of appeal is that the Learned trial Magistrate erred in law in adopting a multiplicand where the deceased was a minor instead of making an award for lost years as opposed to loss of dependency as provided by law. The 5th ground of appeal is that the Learned trial Magistrate erred in law and fact by adopting a dependency ratio of $\frac{1}{2}$ which was not justified, exorbitantly high and excessive in the circumstances. The 6th ground of appeal is that the Learned trial Magistrate erred in law and in disregarding the submissions and evidence of the appellants.

3. In Mombasa High Court Civil Appeal No. 92 of 2015, the 4th ground of appeal is that the Learned trial Magistrate erred in law by failing to deduct the award under the Law Reform Act from the entire award as required by law. The 5th ground of appeal is that the Learned trial Magistrate erred in law and fact by adopting a multiplicand of Kshs. 12,000/= as the deceased's wage without proof of earnings instead of adopting a minimum wage. The 6th ground of appeal is that the Learned trial Magistrate erred in law and in disregarding the submissions and evidence of the appellants.

4. The appellants pray for:-

(a) This court to set aside the judgments of the subordinate court; and reassess the damages payable, if at all;

(b) Any other or further orders that this court may deem just and expedient to grant; and

(c) That the respondents be condemned to pay the costs of the appeal.

5. Ms. Kaguri submitted that the respondents were standing off the road waiting to cross when the appellants' (1st appellant's) motor vehicle knocked them down. She stated that PW3 was not the Investigating Officer, he did not know the traffic case number or the findings of the traffic case. In her view, the appellants' (1st appellant's) insured Driver was innocent as he was not convicted.

6. Counsel recounted that PW2, an eyewitness stated that he was standing off the road besides the respondents and saw the motor vehicle. The respondents crossed the road but PW2 remained behind. It was her submission that the respondents had a duty of care when using the road but they failed to ascertain that the road was clear before crossing it.

7. She submitted that apportionment of liability at 100% against the appellants was excessively high as the respondents did not prove on a balance of probability that the appellants were to blame. She informed the court that she had proposed apportionment of liability at 30:70 in favour of the respondents. She urged the court to make a finding to that effect. She referred to the case of **Andrew Kamau Waweru vs Guchu Muruguri & Another** [2002] eKLR to support her argument that the burden of proof was on the respondents but they failed to discharge the burden.

8. On quantum of damages, Ms. Kaguri's position was that in Mombasa High Court Civil Appeal No. 91 of 2015, the minor was a school going child aged 14 years yet the court awarded a breakdown of a multiplicand for a minor. Counsel's position was that a conventional figure should have been awarded in the court's discretion. She stated that an amount of Kshs.900,000/= was awarded for loss of dependency but in her view an amount of Kshs. 300,000/= should have been awarded. She cited the case of **Kenya**

Breweries Ltd. vs Saro [1991] KLR 408.

9. With regard to Mombasa High Court Civil Appeal No. 92 of 2015, Ms. Kaguri stated that the deceased was aged 25 years. She argued that the court should not have used a multiplier of 25 years but of 24 years. She stated that the deceased was a hawker with a monthly income of Kshs. 20,000/= a fact which was not proved. She submitted that PW2 did not tender evidence of the amount of money the deceased earned. A multiplicand of Kshs. 12,000/= per month was awarded whereas the pleadings of the deceased were different. It was her view that the wages of an unskilled worker should have been used at the sum of Ksh. 5,854 per month in accordance to Legal Notice No. 63 of 2011 on regulation of wages. Counsel pointed out that the pleadings stated that the deceased used to earn Kshs. 40,000/= per month but PW1 and PW2 testified that the deceased used to earn Kshs. 20,000/=.

10. Ms Kaguri informed the court that she had no problem with the dependency ratio in this case. She submitted that a sum of Kshs. 561,984.00 would be appropriate. She further stated that in order to avoid duplicity, the award made under the Law Reform Act should be deducted from the Fatal Accidents Act. She relied on the case of **Kemfro vs A.M. Lubia & Olive Lubia** [1982-1988] KAR 727.

11. In concluding her submissions, she stated that the lower court ignored their submissions. She prayed for the appeal to be allowed with costs to the appellants.

12. Ms. Kendeki, Learned Counsel for the respondents informed the court that she relied on the evidence on record, and in particular that of PW3 and the particulars of negligence in the plaint. She urged the court to disregard the submission that PW3 did not have details of the traffic case. She submitted that the outcome of a traffic case should not determine the outcome of a civil case.

13. Counsel recounted that the respondents were on a pavement waiting to cross the road when they were hit. She added that the fact that PW2 crossed the road should not be used as a basis of apportioning liability as crossing the road is a matter of personal judgment. Counsel submitted that the motor vehicle went off the road and knocked down the deceased thus the reason behind apportionment of liability at 100%.

14. With regard to Mombasa High Court Civil Appeal No. 91 of 2015, she argued that age does not matter in so far as award of damages is concerned. She cited the case of **Daniel Kuria Ng'ang'a vs Nairobi City Council** [2013] eKLR where the court stated that damages are payable to parents of the deceased irrespective of age. In her view, proper principles were used to reach the multiplier.

15. In respect to Mombasa High Court Civil Appeal No. 92 of 2015, Counsel submitted that the deceased was helping his parents with Kshs. 5,000/= per month and the appellants did not rebut that evidence at all. She stated that the Magistrate did not err in that regard.

16. On damages under the Law Reform Act and the Fatal Accidents Act, Ms. Kendeki submitted that it is done purely at the discretion of the court and there was no duplicity in the award made in these appeals. She relied on the case of **Nyamohanga & Another vs Mary Robi** [2015] eKLR to emphasize her point. She added that the prayer by the appellants for deduction of Kshs. 120,000/= from Kshs. 300,000/= be disregarded as it will amount to denial of damages.

17. Counsel referred to the judgment of the lower court in submitting that the submissions of both parties were considered. She prayed for dismissal of the appeal with costs.

18. In response to the respondent's submissions, Ms. Kaguri stated that although crossing the road is a personal decision it should be done diligently. In reference to the case of **Daniel Kuria Ng'ang'a vs Nairobi City Council** (supra), she indicated that the deceased was 18 years old and the court used a multiplier. She distinguished the said case with the present one where the respondent in Mombasa High Court Civil Appeal No. 92 of 2015 was a hawker with no formal skills and as such, their proposed tabulation should carry the day.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If liability should be apportioned;
- (ii) If the damages awarded were excessive; and
- (iii) If the awards made under the Law Reform Act should be deducted from the awards made under the Fatal Accidents Act.

19. This court bears in mind the duty of the first appellate court as espoused in **Epantus Mwangi and Geoffrey Ngatia vs Duncan Mwangi Wambugu** [1982 – 88] 1 KAR 278. The court stated as follows:-

“the principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.”

20. In Mombasa High Court Civil Appeal No. 91 of 2015 which arises from Mombasa CMCC No. 2614 of 2011, PW1, Mwanamvua Musa Mwanyumba (Mwanamvua) testified before the lower court that the deceased Musa (Musa) was her son. He was involved in a traffic accident at Tiwi. She was called by her brother and told about the accident. The deceased died on the way to hospital. She stated that her son was 14 years old and a pupil at Muyumbi Primary School. He was in good health and used to help with house chores. The motor vehicle involved in the accident was KAS 250H. It was her evidence that she spent Kshs. 30,000/= in funeral expenses. She was issued with a police abstract, marked by the court as MFI-1, at Diani Police Station. She obtained letters of administration plt. exh. 2, she instructed her Advocate who wrote a demand letter produced as plt. exh. 4 and sent a notice to the insurance company, plf. exh. 5. PW1 produced the deceased’s death certificate as plf. exh. 6. She stated that if he had finished school, he would have assisted her.

21. On cross-examination, Mwanamvua testified that she did not have a document for funeral expenses for the amount of Kshs. 30,000/= she had mentioned. The money was contributed by friends. She did not take the deceased’s report cards to court.

22. The evidence of PW2, Kithome Nguthu (Nguthu) in Mombasa CMCC No. 2613 of 2011, the subject of Mombasa High Court Civil Appeal No. 92 of 2015, was adopted for the proceedings in Mombasa CMCC No. 2614 of 2011 the subject of Mombasa High Court Civil Appeal No. 91 of 2015.

23. PW3 was No. 68947 PC Mbita Misoi from Diani Police Station. He informed the lower court that he was not the Investigating Officer. He testified that a case was reported on 28th June, 2007 of an accident that occurred at Tiwi. The Driver of the motor vehicle was heading to Likoni and at Tiwi he knocked a pedestrian who died on the spot. The motor vehicle was registration No. KAS 250H. The Driver’s name was Saif Magoyo Musungu. He was charged with two offences of causing death by dangerous driving. PW3 produced a police abstract as plf. exh. 1. On cross-examination, he stated that he could not tell what happened to the case.

24. In Mombasa Civil Appeal No. 92 of 2015, the evidence adduced before the lower court by PW1 Sinia Kamau (Sinia) was that the deceased Mwanja (Mwanja) was her son. She took out letters of administration. She testified that Mwanja was hit by a vehicle at Tiwi on his way from work. He died on the spot. He was a business man aged 24 years. Sinia stated that he used to get Kshs. 20,000/= and that he used to send her about Kshs. 5,000/=. She stated that Mwanja was of good health and was staying alone.

25. It was her evidence that she used Kshs. 125,000/= for Mwanja's funeral. She produced a list of expenditure for the funeral plf. exh. 1, the deceased’s death certificate plf. exh. 2, a police abstract was issued by Diani police station marked MFI-3, a demand letter was sent by her Advocate, it was produced

as plf. exh. 4, a notice to the insurance was produced as plf. exh. 5 and letters of administration were produced as plf. exh. 6. She indicated that she paid Kshs. 30,000/= for the said letters of administration. She prayed for costs of the funeral expenses, the suit and general damages for pain and suffering as per the plaint. Sinia stated that the Driver of the motor vehicle that caused the accident was charged and fined Kshs. 20,000/= and in default 6 months imprisonment.

26. On cross-examination, Sinia stated that the deceased used to sell various things such as grain, vegetables and soap.

27. PW2 was Kithome Nguthu (Nguthu). He testified that he was a hawker who used to trade with Mwanja. Each had his own business. Nguthu recounted how on 25th May, 2006 at around 6:45p.m., Mwanja wanted to cross the road with a friend when he was hit by a vehicle being driven from Ukunda to Likoni. He died on the spot. It was Nguthu's evidence that Mwanja was hit and his body picked from where the vehicle stopped. He stated that Mwanja was a healthy man. He used to make Kshs. 20,000/= in a good month and Kshs. 14,000/= on a bad month. He used to assist his parents. Nguthu assisted in preparations for Mwanja's funeral. They paid Kshs. 45,000/= for transport and Kshs. 7,000/= for a coffin. The money was contributed by friends.

28. On cross examination, Nguthu stated that he saw the vehicle approaching as he stood with Mwanja. The Driver of the motor vehicle had not switched on the lights. Mwanja and his friend started to cross as they assisted each other with luggage. Nguthu remained behind. Mwanja and his friend were hit. Mwanja, aged 24 years, died on the spot and his friend was injured.

29. The appellants did not adduce any evidence in support of their case. The Hon. Magistrate in her judgment considered the evidence that was adduced in respect to the two cases in the lower court and noted that the Driver of motor vehicle registration No. KAS 250H had not switched on the motor vehicle lights as at 6:45 p.m. whereas under the Traffic rules he was required to have switched on the lights by 6:00 p.m. She held the appellants 100% liable for the accident. She was also of the view that the appellants' (1st appellant's) Driver was speeding due to the impact of the accident that threw Mwanja on the windscreen and the fact that he died on the spot.

30. Taking into consideration the evidence adduced before the lower court, it is my finding that the Driver's failure to switch on the motor vehicle lights as required, was an act of negligence which endangered the lives of the deceased persons. It is therefore difficult in the circumstance of the evidence narrated by Nguthu to apportion liability as against the appellants and the respondents. I therefore uphold the decision of the Hon. Magistrate in finding the appellants 100% liable for the death of Musa and Mwanja.

31. Counsel for the appellants submitted that the award of damages under the Law Reform Act should be deducted from the Fatal Accidents Act. In fatal accidents, damages are recoverable under the distinct heads of the **Law Reform Act** (under **section 2(1)(5)** thereof) and the **Fatal Accidents Act** (under **section 4(1)** thereof). **Section 2(1) (5)** of the **Law Reform Act** provides as follows:-

"2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

(2).....

(3).....

(4).....

(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act or the carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of the deceased's persons shall apply in relation to causes under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1). (emphasis added).

32. The above provisions of the Law Reform Act are clear that any cause of action for the benefit of the deceased's estate is not in substitution of or an alternative to the right that accrues to a deceased's dependants under the **Fatal Accidents Act**. Although those who are likely to benefit from the deceased's estate are the same persons who will benefit from the claim under the **Fatal Accidents Act**, this factor is normally considered in the extent of damages to be awarded but it is not a reason to reject a claim for an award under this head. I therefore hold that the Hon. Magistrate did not err in making the awards under both heads.

33. In **Maina Kaniaru & Another vs Josephat M. Wango'ndu**, C.A. No. 14 of 1989, the Court of Appeal held that the rights conferred by section 2(5) of the Law Reform Act, for the benefit of the estate of the deceased persons are stated to be in addition to and not in derogation of the rights conferred on the dependants of the deceased person by the Fatal Accidents Act.

34. On loss of dependency in respect to Mombasa High Court Civil Appeal No. 92 of 2015, the Hon. Magistrate adopted the amount of Kshs. 12,000/= as the monthly income of Mwanja. She stated that Nguthu had testified that Mwanja used to make between Kshs. 14,000/= - 20,000/= per month. Although no document was produced to show the actual income of the said deceased who was a hawker, Nguthu who was also doing hawking business testified that Mwanja used to make between Kshs. 14,000/- 20,000/-. Ms Kaguri stated that the pleadings indicated that Mwanja used to earn Kshs.40,000/- per month which was at variance with the evidence and urged this court to interfere with the award for loss dependency. The court notes that the burden of proof herein is on a probability of success. Mwanja's mother, Sinia, testified that Mwanja used to send her Kshs. 5,000 per month. It is therefore not possible that he used to earn the minimum wage of Kshs. 5,854/- which Ms Kaguri urges this court to apply as a multiplier in working out damages for loss of dependency. Ms Kaguri urged the court to reduce the multiplier from 25 to 24 years. In my assessment of the evidence tendered and the submissions made, I see no misdirection on the part of the trial court in the award of damages for the death of Mwanja. I will therefore not interfere with the decision of the lower court.

35. In Msa High Court Civil Appeal No. 91 of 2015, the facts pertaining to the accident as narrated by PW2 are similar to that of Mombasa High Court Civil Appeal No. 92 of 2015 where I held that the appellants are 100% liable for the accident. For similar reasons, I hold that the appellants are 100% liable for Musa's death in the former case. On loss of dependency, the Hon. Magistrate applied a multiplicand of Kshs. 6,000/= and a multiplier of 25 years and a dependency ratio of 1/2 thus arriving at an award of Kshs. 900,000/- for loss of dependency. Counsel for the appellants' argument in Mombasa High Court Civil Appeal No. 91 of 2015 was that the Hon. Magistrate used a multiplicand where the deceased was a minor instead of making an award for lost years. The said award was challenged by Counsel for the appellants as being too high due to the age of the deceased who was 14 years old. It was thus not known how he would have turned out to be in his professional life.

36. In the case of **Kenya Breweries Ltd. vs Saro** CA No. 144 of 1990, the Court of Appeal while addressing a similar issue made the following observation:-

".....But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably

take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare”.

The Court went further to state thus:

“In our view damages are clearly payable to the parents of a deceased child, irrespective of age of the child, irrespective of whether or not there is evidence of pecuniary contribution.”

37. In Nakuru High Court Civil Appeal No. 39 of 2013, **Simon Kibet Langat and another vs Miriam Wairimu Ngugi (suing as the Administrator of the estate of Daniel Mwiruti Ngugi** [2016] eKLR, Judge Mulwa declined to interfere with an award of Kshs. 720,000/- made by the trial court for loss of dependency for a 14 year old minor. The said Judge stated as follows:-

“Going by the global sums awarded by the courts and taking into account the age of the deceased, I find that the sum of Kshs. 720,000/- awarded by the trial court not too high to call for this court's interference. The trial court used a different method of dependency ratio and expected working life and income in assessing the damages which is quite in order as that was in its discretion the method it preferred, and as used in many decisions where the court picks a multiplier and expected income and a multiplicand to calculate the lost years and/or loss of dependency.”

38. In Msa High Court Civil Appeal No. 91 of 2015, the deceased's mother did not produce the deceased's report card to show how he was performing in school. Although the foregoing is not a mandatory requirement, it is desirable to do so. The appeal in the case of **Simon Kibet Langat and another vs Miriam Wairimu Ngugi (suing as the Administrator of the estate of Daniel Mwiruti Ngugi (supra)** was determined in the year 2016 and the award of Kshs.720,000/- was upheld by the court. Going by the said decision, I consider the award of Kshs.900,000/- on the higher side. I therefore set aside the award of Kshs.900,000/- for loss of dependency made by the Hon. Magistrate and substitute thereof a conventional award of Kshs. 800,000/- for lost years. This amount is awarded after taking into consideration the erosion of the Kenya shilling since the time the decision in the **Simon Kibet Langat case** (supra) was made and the date of the decision herein. I decline to interfere with the other awards. The final award therefore works out as follows –

- (i) Lost years - Kshs.800,000/-
- (ii) Pain and suffering - Kshs. 20,000/-
- (iii) Loss of expectation of life - Kshs. 100,000/-
- (iv) Special damages - Kshs. 10,000/
- (v) Gross amount - Kshs. 930,000/-

39. Contrary to the submissions by the appellants' Counsel, the Hon. Magistrate in her Judgment considered the submissions of the Counsel for both parties before arriving at the decisions the subject of the appeals herein. The upshot of the foregoing is that the appeal in Mombasa High Court Civil Appeal No. 91 of 2015 is partly allowed. The appellants will bear two thirds of the costs of the lower court case and of the said appeal. The appellants will bear the costs of the lower court case in Mombasa High Court Civil Appeal No. 92 of 2015 and of the said appeal. Interest is awarded to the respondents at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of July, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mulama holding brief for Ms Kaguri for the appellants

No appearance for the respondents

Ms Bancy Karimi - Court Assistant