



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 78 OF 2016

DISMAS ONDARA ONG'ONDI.....APPELLANT

-VERSUS-

ESTHER ADHIAMBO JUMA (Suing as legal representative

of ALEX JUMA OLOO (DECEASED).....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. E. Muriuki Nyagah, Senior Resident Magistrate in Migori Chief Magistrate's Civil Case No. 2039 of 2015 delivered on 11/10/2016)

JUDGMENT

1. The appeal herein is on the award of damages by the trial court in the grounds as immortalized in the Memorandum of Appeal dated 24/10/2016 as follows:-

- 1. That the award of General damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.**
- 2. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.**
- 3. The learned trial magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.**
- 4. The learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.**

2. Liability was apportioned by the consent of the parties at 30% - 70% in favour of the Respondent. The cause of action arose from a road traffic accident where the deceased lost his life. The suit was filed by the widow and she prayed for damages under the Law Reform Act and the Fatal Accidents Act. In rendering judgment, the trial court made the following awards, subject to the agreed liability: -

• **General Damages under Law Reform Act:**

For pain and suffering Kshs. 10,000/=

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

• **General Damages under Fatal Accidents Act:**

Loss of Dependency Kshs. 2,814,614/40

3. The appeal was disposed of by way of written submissions. The Appellant mainly challenged **four aspects** of the judgment; the monthly income of the deceased, the multiplier, the dependency ratio and whether the award on loss of expectation of life ought to have been deducted from that of the loss of dependency.

4. As the appeal is on the assessment of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will

depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277.**)

5. A Court in dealing with an appeal of this nature must always be alive to the eminent principles for consideration. These were enumerated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777** when the Court expressed itself clearly thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.’

6. This position was restated by the Court of Appeal in the case of **Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101** and so recently in the case of **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.**

7. I will now deal with the issues raised by the Appellant. The first one is the **monthly income** of the deceased. It is on record that the deceased that the deceased was employed at South Nyanza Sugar Company Limited as a Cane Operator and as at the time of his untimely death he was earning a basic salary of Kshs. 25,959/=. I find the position taken by my brother **Mbogholi, J.** in **Cecilia Wanja Maina & 2 Others vs. Reme K. Limited & Another (2015) eKLR** as good law. The learned Judge settled for the basic income less the statutory deductions. I hence settle for the monthly income in this case as Kshs. Kshs. 25,959/= less NHIF and NSSF contributions and that makes an income of **Kshs. 25,439/=** monthly.

8. On the **multiplier**, the deceased was aged 56 years old. He was in a formal employment at South Nyanza Sugar Company Limited which is a state corporation. The retirement age is hence capped by the Government at 60 years. The deceased therefore had 4 more years to retirement. I will settle for that multiplier.

9. As to the **dependency ratio**, there is evidence that the deceased had a family. All his children fully depended on him including the Respondent who was a house wife with no proven income. A ratio of 2/3 is applicable herein.

10. As to whether the award on loss of expectation of life ought to have been deducted from that of the loss of dependency, I believe the law is well settled on this aspect. As long as the twin awards are made on distinct heads under the Law Reform Act and the Fatal Accidents Act it is imperative that the award on loss of expectation of life be offset from that of the loss of dependency. (See holding 3 in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777** and also the case of **Maina Kaniaru & Another vs Josephat Muriuki Wang'ondu, Court of Appeal, Civil Appeal No. 14 of 1989 (unreported).**

11. The upshot is that this Court finds good reasons to interfere with the discretion of the trial court in assessing the awards under the Law Reform Act and the Fatal Accidents Act. I hereby substitute those awards with the following: -

Damages under the Law Reform Act:

- Pain and suffering = **Kshs. 10,000/=**
- Loss of expectation of life = **Kshs. 100,000/= Damages under the Fatal Accidents Act:**
- Loss of Dependency = **Kshs. 25,439/= x 2/3 x 4 x 12 Kshs. 814,048/=**

12. In offsetting the amount under the loss of expectation of earning from that of the loss of dependency and considering the agreed liability, the net amount awarded to the Respondent is **Kshs. 576,834/=**. The Respondent is also awarded the costs of the suit in the lower court and interest at Court rates from the date of judgment in the trial court. As the appeal has partly succeeded each party shall bear its own costs of the appeal.

13. As I come to the end of this judgment, I wish to express my sincere and immense gratitude to all the Counsels who appeared in these proceedings for the well-researched submissions and the authorities referred to which I have found truly useful. If I have not expressly referred to any authority cited, that it is not out of disrespect or lack of appreciation for their industry.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of July 2017.

A. C. MRIMA

JUDGE