



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 61 OF 2014

MARGARET WANJIRU WANJIRI

REGINA MWIHAKI KANYUA

(Suing as personal representatives to the

estate of **JOSEPH MICHAEL NJUGUNA – DECEASED.....APPELLANTS**

VERSUS

ISAAC THUMBI GITAU.....1ST RESPONDENT

MWANGI CYRUS.....2ND RESPONDENT

MAINA SUSAN.....3RD RESPONDENT

(Being an appeal from the Judgment/Decree of Honourable R. Amwayi – RM Delivered on 23rd April 2014 in Nakuru CMCC no 407 of 2013)

JUDGMENT

1. The appeal hereof is on the *quantum* of damages awarded to the Appellants in the trial court on the 23rd April 2014.

The deceased died at the age of 49 years, 14 days after the fatal accident involving the vehicle he was travelling in as a fare paying passenger being motor vehicle KBG 346V that collided with another KBQ 234W on 22nd May 2013 along The Nakuru-Eldoret Highway. At the beginning of the hearing, parties agreed and apportioned liability at 80% against the Respondent, then the defendant.

2. The deceased Joseph Michael Njuguna was said to have been a businessman in Nakuru, an Events Organiser trading as Dotcom Electronics, and the certificate of registration of business was produced as exhibit.

Upon hearing the suit, the trial court awarded the Appellants, being the administrators of the deceased Estate the following damages:

a) Under Law Reform Act:

- **Pain and suffering** - **Kshs. 50,000/=**
- **Loss of expectation of life** - **Kshs.100,000/=**

b) Under Fatal Accidents Act

- (Loss of Dependency)** - **Kshs.704,000/=**

In arriving at the loss of Dependency, the trial court adopted a multiplier of 11 years and dependency ratio of 2/3 upon an income of Kshs.8,000/= per month.

3. The appellants were dissatisfied with the award of damages both under the Law Reform Act as well s under the Fatal Accidents Act as being inordinately low as to amount to an erroneous assessment, in that that the trial magistrate erred in law and fact in awarding

Kshs.50,000/= for pain and suffering when the deceased was hospitalised for 11 days before he died (Ground No.2) It is proposed to enhance the same to Kshs.200,000/=.

In ground **No. 3 and 4**, it is proposed that the income of Kshs.8,000/= be set aside and enhanced to Kshs.120,000/= per month upon a multiplier of 21 years.

4. This is the first appellate court. I am obligated to re-evaluate and reconsider the evidence adduced before the trial court and come up with own findings and conclusions. **Selle -vs- Associated Motor Boat (1968) e KLR.**

It is further my duty to consider whether to interfere with the award of damages, which I should only if I am convinced that the trial court took into account an irrelevant factor or failed to consider a relevant factor to come to the complained of awards, and whether the awards are so low as to be a wholly erroneous estimate of damages See **Kemfro Africa Ltd t/a Meru Express Service Ltd And Another -vs- A.M. Lubia (1982 – 1988) KAR 272.**

5. Damages for Pain and Suffering & Loss of Expectation Life

There is no doubt that the deceased succumbed to his injuries 11 days after the accident, and must have suffered immense pain during the period. The trial Magistrate awarded Kshs.50,000/=.

In **Joseph Kamau Njoroge & Another (2011) e KLR** and **Julian Njeri Muriithi -vs- Veronica Njeri Karanja & Another (2015) e KLR**, the respective courts awarded Kshs.150,000/= and Kshs.200,000/= for deceased's persons who died 13 days after the accident.

6. The respondent citing **Awadh Ahmed Awadh -vs- Shakil Ahemd Khan (2001) e KLR** submits that the award is adequate, being at the court's discretion.

The length of time a victim undergoes pain before death is a relevant factor to be considered.

This in my view was not adequately taken into account by the trial magistrate. See **Kemfro Case (Supra)**. I want to adopt the rationale in the case **Benedeta Wanjiki Kimani -vs- Cheboi & Another (2013) e KLR** that generally nominal damages are awarded if death is immediate but higher awards if pain and suffering is prolonged.

In the case Kshs.200,000/= was awarded for prolonged hospitalization.

I have considered other authorities. **Civil Appeal No. 191 of 2013 (Nbi) Francis Wainaina Kimugu -vs- Elijah Oketch Adella (2015) e KLR, Edner Gesare Ogega -vs- Aiko Kebiba (2015) e KLR and Mwita Nyamohanga & Another -vs- Mary Roboi Moherai (2015) e KLR.** The trend on the awards range between Kshs.100,000/= to Kshs.300,000/= for prolonged hospitalization before death.

I therefore set aside the award of Kshs.50,000/= damages for pain and suffering and award Kshs.200,000/= as more reasonable. The award of Kshs.100,000/= for loss of expectation of life is upheld there being no appeal against it.

7. Damages for loss of Dependency

For the court to determine damages under the Fatal Accidents Act, the deceased income (multiplicand) ought to be determined as well as the dependency ratio and the multiplier.

Upon principles stated in the **Beatrice Thairu-vs- Hon. Ezekiel Bargetuny Another HCC No. 1438 of 1990** (unreported) case, such determination is at the court's discretion upon evidence adduced by the plaintiffs.

See also **HCA No. 68 of 2014 Naomi Nyambura Karanja -vs- Zacharia Mutemi Kadunga (2017) e KLR.**

8. I have considered that the deceased 49 years old at date of death operated a business, and indeed had numerous cash deposits in his personal bank account at Family Bank. Deposit slips into the said account were duly produced before the trial court (Ext 17a, b).

As observed by the trial Magistrate, the bank Account was the deceased's personal account, not the business account. The banking slips are for the year 2011 whereas the deceased died in June 2013. No explanation was adduced for the failure to produce deposits for say 2012 – 2013.

I find no evidence of the deceased's income from his Events Organizer business. The trial Magistrate did not err in coming to the conclusion he did. However his adoption of Kshs.8,000/= per month is not supported by any legal or the relevant wages guidelines. He did not indicate which minimum wages nor the category of workers he adopted in arriving at the said sum.

I have looked at the **Regulation of Wages Amendment Order 2013 Legal Notice No. 196 and 197.** These are the relevant minimum wages.

I would equate the deceased to an ungraded artisan (category g and h) whose wages range between Kshs.10,071/= to Kshs.15,434/70 in the Municipalities, Nakuru being in that category, for the year 2013.

From the deceased's bank accounts it is evident that he was engaged in some income earning activity though not defined, going by the deposits made.

I am therefore persuaded to adopt a sum of Kshs.15,000/= per month on the above basis. I find no basis upon which I may adopt an income of Kshs.120,000/=. It is not supported by evidence or rationale.

9. (a) While upholding the trial courts findings I am also persuaded and bound by the holding of the Court of Appeal decision in **Theta Tea Co Ltd -vs- Florence Njau Njambi (2000) e KLR** that:

“ It would be a great injustice to a lot of Kenyans if the court would subscribe to the view that the only way to prove or profession of a person or income whereby production of documents, as having earned a livelihood in various ways without any documentation.---”

10. However, some form of business activity ought to be evidenced. The appellant faults the trial court for applying 11 years as the multiplier. The deceased was in informal business, meaning he was not bound to retire at the age of 60 years. He was not said to have been unhealthy. He could probably have worked to beyond 70 years.

Notwithstanding, the court has to consider uncertainties of life, which itself is uncertain. The trial magistrate in his judgment did not state on what basis or cite any precedent that persuaded him to apply 11 years as the multiplier.

11. I have been urged to set aside the 11 years multiplier and enhance the same to 21 years. No authorities were cited for the proposition. The respondent has urged me to consider the multiplier approach stated in **Mwanzia Ngalali Mutua -vs- KBS (RingeraJ)** and quoted in **Albert Odawa -vs- Gichimu Gichenji, Nakuru HCCA No. 15 of 2003 (2007) e KLR**, and grant a global sum in loss of dependency. I am not persuaded to do so.

I have considered the said approach.

12. The deceased left behind young children and a wife. They depended on him for their upkeep. The length of dependency in the matter can be ascertained. The youngest child was 16 years.

In **Richard Macharia Nderitu -vs-Philemon Rotich Langas(2013) e KLR** the court applied multiplier of 15 years. The deceased died at 47 years.

13. Having considered the life expectancy, length of dependency and vagaries of life, I am persuaded to set aside the multiplier of 11 years as being too low and to enhance the same to 11 years which in my view reflects a reasonable and expected working and productive life of a person in the informal business as opposed to a civil servant who retires at 60 years but also continues to engage in income generating ventures to after 70 years of age.

Thus loss of dependency is re assessed as follows:

Kshs.15,000 X 12 X 13 X 2/3 = 1,560,000/=.

The appeal thus succeeds to that extent. The trial courts judgment on assessment of damages is set aside and substituted with the following awards in damages:

a) Pain and suffering	-	Kshs.200,000/=
b) Loss of expectation of life	-	Kshs.100,000/=
(not interfered with)		
c) Loss of dependency	-	Kshs.1,560,000/=
d) Special damages	-	<u>Kshs. 29,100/=</u>
Total	-	<u>Kshs1,889,100/=</u>

14. I must state here that the Respondent did not file a cross appeal on any item or award of the trial courts judgment. I shall therefore not make a findings on the Respondents submissions that are not subject of the appeal in that the appellant ought not benefit from the awards under the Law Reform Act as well as under the Fatal Accidents Act as being double compensation.

However, I will state my opinion on the same, being guided by the **Court of Appeal pronouncements in Civil Appeal No. 22 of 2014 in Hellen Waruguru Waweru -vs- Kiarie Shoe Stores Ltd (2015) e KLR (Waki, Nambuye & Kiage, JJA)**, and my own holdings in **HCA NO. 61 of 2014 Margaret Wanjiru & Another-vs- Isaac Thumbi & Others** among others.

That in reaching my reassessment of the damages as required upon the principles stated both in the two statutes – The **Law Reform Act** and

the **Fatal Accidents Act**, I have **“Taken into account” Section 2(5)** of the **Law Reform Act (Cap 26)** the rights conferred by or for the benefit of the estate of the deceased person shall be in addition to and not in derogation of any rights conferred on the dependants by the Fatal Accidents Act. There is therefore no requirement or necessity to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act.

17. The final result is that the appeal is allowed in the manner stated in Paragraph 14 above with costs to the appellants.

Dated, Signed and Delivered this 21st Day of September 2017

J.N. MULWA

JUDGE