



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 112 OF 2015

JUMA KIGAMBWIAPPELLANT

VERSUS

**LOISE WAMBUI KAHENYA (Suing as the personal representative of the estate of
STEPHEN KAHENYA.....RESPONDENT**

J U D G M E N T

1. By his Memorandum of Appeal dated 30/7/2015 and filed in Court the same day, the Appellant faults the decision of the trial court dated 21/7/2015 on 8 grounds but when looked at closely the judgment is faulted on only two ground that there was no basis to adopt a multiplicand of Kshs.20,000/= per month because no evidence was led to prove the deceased's earning and as a result the sum accorded of Kshs.2,400,000/= was arrived at in error and bereft of evidence hence overly excessive and secondly that the award of Kshs.40,000/= for pains and suffering was not merited.

2. I take the appeal to contest the choice of multiplicand as applicable in the *multiplier formula* of assessment of damages. This being a first appeal this courts' mandate is not only to re-assesses and re-examine the entire evidence afresh with a view to coming to own conclusions but also well aware that it can only interfere with the trial courts findings on factual matters if it be proved that the trial court committed an error by considering irrelevant facts or failing consider relevant facts or short of that misapprehended the applicable principles and therefore arrived at a wholly erroneous estimate as regards assessment of damages^[1].

3. In the judgment of the trial court, found at pages 164 to 165 of the Record of Appeal, the court delivered itself as follows:-

“On loss of dependency, the deceased is said to have been a mason earning averagely 20,000/-. However, no documents have been produced to this effect, I take note that the deceased was aged 33; prime age and of good health. It is not impossible that such a man could make an average of 20,000/= a month. I am inclined to believe that indeed he could make such an amount per month as a young energetic Manson. A multiplier, the deceased was aged 33 years and considering the lifespan, natural affliction and the retirement age and uncertainties of life, I adopt multiplier of 15 years was agreeably submitted by the defendant”.

4. The evidence on earning of the deceased was led by PW 1, the widow and only witness in the matter. That witness said in the proceedings at pages, 154-156.

“...my husband was a masonry (mason) earning Kshs.20,000

monthlyHe was a casual mason in Mombasa. He used to earn about 20K. He was healthy, he used to send us half of his salary for our use.....

He was a general mason. I cannot tell how much he could be paid. I don't have cash voucher”.

5. It is not deniable that there was no evidence that the deceased earned Kshs.20,000 per month. It was therefore without evidence for the trial court to say as it did that, it is not impossible that such a man could make such an average of 20,000per month. To that extent that the trial court was to evaluate the evidence and only decide based on factual evidence availed, the court fell into error in basing its decision upon possibilities. The position of the plaintiff was that the deceased was a manson earning Kshs.20,000/= per month. The plaintiff was not suing upon possibilities but on facts. It was such facts that fell upon the plaintiff to prove but which she did not prove when she said on cross examination that she could not tell how much she earned.

6. However failure to prove earnings is not by itself a basis to say the deceased earned nothing absolutely[2]. The courts have held that where there is no evidence of earnings then the court adopts the minimum wage guidelines provided by the Regulations of wages and conditions of Employment Act and the orders routinely made pursuant thereto.

7. The deceased died on 16/3/2009 hence the operative and reigning order is that of 2006[3]. In that order the monthly minimum wage for a mason in Mombasa was begged at Kshs.8,002/= that is the sum the court ought to have used even if the parties refrained from performing their duty to assist the court reach a just and fair determination.

8. That being the position the damages under the heading loss of dependency would work out as follows:-

$$8002 \times 12 \times 15 \times 2/3 = 960,240.00$$

9. I do not consider the appellant to challenge the choice by the trial court of the multiplier and the dependency ratio hence those are not before me in this appeal.

10. On the challenge of award for pains and suffering at Kshs.40,000/=

on the basis that there was no evidence on how long the deceased survived after the accident so as to experience pain and suffering and be entitled to damages for same, this court takes the position that an appellants court is not at liberty to slightly and freely interfere with an assessment of damages by trial court, being a discretionary matter unless there be demonstrated an error in principle[4].

11. In this appeal, the trial court is faulted for awarding damages when there was no evidence on how long the deceased survived between the accident and his death. It is indeed true that the evidence was led in a very clumsy manner totally neglectful of the need to avail to the court the basic facts. However I have been availed a Record of Appeal which among other things contain the statement of the driver of the offending motor vehicle. In that statement, the driver said:-

“Ito my extreme left to avoid running over him but was hit by the right front outer mirror and fell down. He then got up and went onto other side of the road and stood.....

.....I returned to the scene with the police in another car and picked up the injured pedestrian and returned to Likoni Police Station. He was taken to Coast General Hospital by police....”.

12. The foregoing clearly demonstrate that the deceased never died on impact and on the spot. He was

alive even after the driver had made a report to police station and come back to the scene. He must have therefore been conscious and therefore suffered pains and suffering from which his estate and dependents' were entitled to damages as the trial court did find and award. This ground of appeal fails and is therefore dismissed.

13. In summary Judgment of the lower court is set aside and in its place substituted to the extent only of damages for lost dependency in the sum of Kshs.960,240.00.

14. The total award therefore works out as follows:-

General damages for lost dependency - Kshs. 960,240.00

General damages for loss of expectation of life - Kshs. 100,000.00

General damages for pains & suffering - Kshs. 40,000.00

Special damages - Kshs. 95,700.00

Total damages - Kshs.1,195,940.00

Less 40% contraction -Kshs. 478,376.00

Net due Kshs. 717,564.00

15. The net sum of damages due shall attract interest at court rates as follows:-

i) General damages; from the date of Judgment of the lower court till payment in full.

ii) Special damages from the date of the suit till payment in full.

16. Since the appeal has only succeeded partially and to a very small extent I direct that each party shall bear own costs.

Dated and delivered at **Mombasa** this **18th** day of **December 2017**.

P.J.O. OTIENO

JUDGE

[1] Kenya Power & Lighting Co. Ltd vs Andrea Otieno Odhiambo [2016] eKLR citing Ugenya Bus Services vs Gachihi [1976 – 1985] EA 575

[2] Jacob Awiga Naraja vs Simeon Obayo[200] eKLR

[3] Legal Notice No. 38 of 12 May 2006

[4] Ugenya Bus Service vs Gachihi(supra)