



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.31 OF 2014

(Appeal from the Judgment of the Resident Magistrate's Court at Mairiakani (Honourable Resident Magistrate Mr.L.K. Gatheru) given in Mariakani Senior Resident Magistrate's Court Civil Suit No. 119 of 2012 on 11th March, 2014)

JOHN WAWERU.....APPELLANT

=VERSUS=

ASENATH KARUA M'NJAU

(Legal representative of estate of

NELSON OWITI-Deceased).....RESPONDENT

JUDGMENT

Introduction:

1. By a Memorandum of Appeal dated the 14.3.2014 and filed in court on the same day, the Appellant faults the trial court largely on its assessment of damages, to the effect that the award of sum of Kshs.1,121,200 was erroneous for being without evidence on the deceased earning; that in terms of section 4 of the Fatal Accident Act, brothers and sisters were not dependants; that there was never evidence that the deceased was employed; that the adoption of a multiplier of 15 years and multiplicand of 10,405 per month was erroneous and lastly that the trial court erred in failing to adequately consider the written submission filed for its consideration.

2. By direction given by court on the 29.10.2015, with the consent of the parties, this appeal was canvassed by way of written submissions which were duly filed and the advocates then appeared in court on 2.12.2015 to highlight.

Submissions on behalf of appellant:

3. By its brief submissions as highlighted by Mr.Gor orally, the appellant faults the trial court on several fronts but stressed the fact that the court having found that only the mother to the deceased rather than his siblings were his dependents it was wrong to adopt a multiplier of 15 years and the court ought to have

considered the age of the mother and not only that of the deceased.

Submissions on behalf of the Respondent:

4. The Respondent resisted the appeal supported the trial courts findings relied entirely on the written submissions and added that although the trial court awarded what it termed lost dependency the arguments leading to the award are clear that the intention was the confusion in terminologies will always occur and that the court need not be too technical but look at determining issues on the command of substantial justice. For that submission reliance was placed on the court of appeal decision in **CACA No. 244 of 2011 KENYA PORTS AUTHORITY -VS- BERYLE BETHA MALOWA WERE** where the court accepted the prospects and possibilities of interchange of terminologies particularly where, like in the present appeal, a claim is brought under both Fatal Accident Act as well as the Law Reform Act.

5. According to the Respondents advocate the only issue in this appeal would be summarised as to whether or not the trial court was entitled to make an award under the heading lost dependency and to use multiplicand and the multiplier it used.

Jurisdiction:

6. As a first appellate court, this court's jurisdiction and duty is to reassess, reexamine and reevaluate the entire evidence and to come own to won independent conclusion based on the record at trial without necessarily disregarding the findings by the trial court noting that the trial court had the benefit of seeing the witnesses testify and observing their demeanor. See **SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD. & ANOTHER.[1968] EA 123** I also proceed from the standpoint that assessment of damages is purely a matter of discretion by trial court.

7. With that duly in mind and after perusal of the accord, the memorandum of appeal, written submissions as well as the oral submissions offered and the authorities on point, I have isolated the following issues as talling for determination and resolution by the court.

Issues for determination:

(I) Are brother and sisters listed at paragraph 7 of the plaint dependant under section 4 Fatal Accident Act.? (grounds 2 & 6 &7).

(II) Did the trial court consider and appreciate the evidence and submission tendered (Grounds 5 11.)

(III) Was the award for lost years (nay lost dependency) duly awarded.

Who are dependents under Section 4 Fatal Accidents Act?

8. The wording and spirit of the statutory provision is not in doubt and need no novel or ingenious interpretation. It says sibling are not dependants.

9. In this case the trial court had this to say about that position:-

“I must deviate from the arguments of the dependant counsel to second guess the life of the mother as I am already speculating on that of the deceased.”

10. My reading of the record does not reveal any reference to the award being made for lost dependency for the benefits of the siblings. The trial court seem to have appreciated the submissions by the Appellant, then as defendant, except that it did not agree that the mother would not live beyond 10 years. It must be noted that in calculating lost years the court take a journey of approximations and at times speculations. There is infact no hard and fast rules. What guide the court is evidence adduced and as it were the experience of a particular judicial officer.

11. I find nothing to fault the trial court on this point and hold that the court did not treat the listed siblings as dependants to the deceased.

Consideration of Evidence and Submissions:

12. The record of trial in the lower court is brief and clear. The plaintiff called two witnesses after which the parties agreed on liability and the defendant therefore did not lead any evidence.

13. Infact only the evidence of Pw1 went to the issue at hand in so far as the witness delved on the profession of the deceased as a driver and that he earned some kshs. 500/= per day of which he sent to the mother between 2000-3000 per month by Mpesa.

14. Having reevaluate the evidence on the face of the judgment appealed against I am unable to find that the trial court glossed over the evidence or the submission offered and on that account the grounds of appeal based on alleged failure must fail.

Was the award of damages for lost dependency merited?

15. Grounds 1,4,8,9 & 10 attack the exercise of jurisdiction by the trial court. In the choice of multiplicand, multiplier and dependency and saliently that damages under loss of dependency was never pleaded. It is worth noting that both counsels in their submission addressed the court on the heading as such, loss of dependency. No distinction was made that the damages sought ought to have been lost years as opposed to loss of dependency. But what injustice can be fathomed whether the award was under the law perform Act or Fatal Accidents Act?

16. In this appeal the Respondent was the administrator of the estate of the deceased and also a dependent. She was entitled to pursue both claims, only subject to avoidance of double compensation under both statutes. Noting the formular for calculation of both awards is the same and there having not been a doubt award, I see no injustice or prejudice the appellant has suffered by award being heeded 'loss of dependency'.

17. Equally, it is not cast in stone that income can only be proved by documents. Since **JACOB AYIGA MARUJA & ANOTHER -VS- SIMEON ABAYO [2005] eklr** as followed in Kenya Ports Authority (cited above), court can rely on oral evidence where no document is available or where none was kept.

18. To that extent I do not find it justifiable to fault the trial court for having adopted the approach it adopted in assessing damages by adopting the minimum wage as the multiplicand.

19. However dependency is matter of fact. The evidence on record is that the deceased would send to the mother a sum of between 2000 and 3000 per month. That in my assessment is about 1/3 of the multiplicand adopted, based on evidence that was not controverted. By evidence the dependency ration was therefore proved at 1/3 and not 2/3 as adopted by the trial court. In so proceeding I find that there was an error in principle which entitles me to interfere in the calculation and ultimate award of damages under this heading. I will thus proceed and interfere and calculate the damages as following:-

$$10405 \times 15 \times 12 \times 1/3 = 624,300.$$

20. In computing the award as I have done I am convinced that there is no justification in interfering with the multiplier for it it was a discretionary factor and no justification has been shown that there was an error in the exercise of that discretion.

21. The upshot of the foregoing is that this appeal succeeds to the limited extent that the dependency ration has been upset and the award under loss of dependency recomputed.

22. I therefore set aside the trial court's judgment to the said limited extent and substitute therefore the sum with a judgment in the sum of kshs 777,200 made up as follows:

a) Pains and suffering	20,000
b) Loss of expectation of life	120,000
c) Loss of dependency	624,300
d) Special damage	<u>12,900</u>
Total	777,200

23. The parties having agreed on apportionment of liability at 20.80%, in favour of the plaintiff, the award is subjected to that apportionment as follows:

Kshs.777,200

Less 20% x 155,4407

621,760

24. The judgment of the court on damages payable by the appellant to the Respondent is therefore entered in the sum of Kshs.621,760 plus costs at trial and interest from the date of judgment by the lower till payment in full.

25. Since the Appellant has succeeded only to a limited extent, the order on costs in this appeal that commends itself to me is that each party shall bear own costs.

26. It is so ordered.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

In the presence of:-

Mr.Olwande for Gor for Appellant.

Ms.Maithya for Respondent.

P.J.O.OTIENO

JUDGE