



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO.69 OF 2012

ISAACK ABDIKARIM ABDILE.....1ST APPELLANT

PALM OIL TRANSPORTERS.....2ND APPELLANT

-VS-

ROSE KINANU MUCHAI (legal representative of the estate of

PAUL RUFUS MUGUONGO.....RESPONDENT

JUDGMENT

[1] This appeal arises from the decision of Hon R.N. Kimingi, Chief Magistrate, dated 23rd June 2010 in which she awarded the Respondent a sum of Kshs 1,112,000 as General Damages under the Law Reform Act and Fatal Accidents Act. The Appellants were dissatisfied with the said decision thus filed this appeal. The grounds of appeal are set in the Memorandum of Appeal as follows:

1. **The Learned Trial Magistrate erred in law and fact in arriving at a decision on the quantum of damages by failing to appropriately consider the weight of the evidence.**
2. **The Learned Trial Magistrate erred in law and fact by making an award for loss of dependency in the sum of Kshs 1, 320, 00 which is inordinately high so as to amount to an erroneous estimate.**
3. **The Learned Trial Magistrate erred in law and fact in adopting a multiplier of 11 years to calculate loss of dependency.**
4. **The Learned Trial Magistrate erred in law in adopting the figure of Kshs 15,000 as the deceased's monthly earning when there was no evidential basis to back up the said figure and which figure is in all the circumstances of the case inordinately high so as to amount to an erroneous estimate.**

[2] Parties filed consent in court on 4th June 2015 wherein they agreed this appeal to be canvassed by way of written submissions. Parties filed their respective submissions which I shall consider below.

Appellant's submissions

[3] The Appellant correctly submitted on the general principle in considering an appeal on quantum, that is to say, that the appellate court will not normally interfere with exercise of discretion by the trial court in assessing damages unless the trial court has either acted on wrong principles or awarded so excessive or so inordinately low damages or has taken into consideration irrelevant matters or failed to take into consideration relevant matters and in the result arrived at the wrong decision. For this proposition the Appellants relied on the case of **PAUL KIPSANG KOECH & ANOTHER V TITUS OSULE OSORE**

HC CIVIL APPEAL NO. 6 OF 2012. According to the Appellant, the documents produced at the trial showed that the deceased was aged 49 years, was a father of six and his educational background was unknown. However, the Appellant argued that, the allegation that he was earning Kshs 30,000 per month were never supported by any evidence. They argued that there was absolutely no evidence that the deceased ever worked or operated his own business. But despite this reality, and in the absence of evidence, the trial magistrate held that the deceased was not just a driver but that a sum of Kshs 15,000 per month was reasonable earnings.

Respondent's submissions

[4] On the other hand it was submitted for the Respondent that the Appellant was being dishonest in not telling the court that the suit in the lower court was finalized by consent, thus, the issue of the Respondent giving evidence did not arise. It was further submitted that having consented that the suit be heard by way of submissions on the issue of quantum, the Appellant herein is estopped from turning around and stating that no evidence was tendered by the Respondent. With regard to the deceased's earnings the Respondents submitted that they had no clue where the Appellants got the idea that the deceased was a driver when they had pleaded and submitted that he was a businessman dealing in *miraa*. It was finally submitted that the deceased was a vibrant 49 year old man doing a thriving business of *miraa* and that he could have continued working for another 16 years or more. Therefore, to the Appellant, a mere 1.1 million for a businessman of 49 years was too low and that the award of general damages awarded to the Respondent was on the lower side and should not be disturbed. Consequently the Respondent urged the court to dismiss the appeal.

DETERMINATION

[5] This being a first appeal the court is obligated to analyze and reassess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify. See **SELLE vs. ASSOCIATED MOTOR BOAT COMPANY (1968) EA 123**. I have carefully considered the evidence and the rival submissions by the parties. It is not in dispute that judgment on liability was entered for the Respondents against the Appellant in the ratio of 80%:20%. The issue for determination in this appeal is only on quantum of damages. However, parties agreed by consent that quantum be determined upon written submission. Consequently none of the parties tendered evidence in the lower court. It was submitted for the Respondent that the deceased was aged 49 years and that he was a family man with a wife and 6 children and that he was an industrious business man earning approximately 30,000 per month from his *miraa* business. The Appellants on the other hand contended that though the deceased was said to have engaged in *miraa* business and that he was earning Kshs 30,000, in absence of documentary proof, the Respondent had not proved on a balance of probabilities that he used to earn Kshs 30,000. Consequently, they urged the court to adopt an amount of Kshs 10,000. I will apply the legal threshold on the above facts.

Legal threshold

[6] Circumstances under which an appellate court will interfere with an award of damages by a trial court are now clear. These are:-

- (a) *Where the trial court applied the wrong principles as in taking into account irrelevant factors, or leaving out relevant ones;*
- (b) *Or short of the above, where the amount of damages awarded is so inordinately high or so inordinately low as to represent an entirely erroneous estimate.*

On this threshold, see the case of **BASHIR AHMED BUTT v UWAIS AHMED KHAN [1982-88] KAR 5** where it was stated as follows;

An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the

Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

[7] The learned trial magistrate in awarding damages for loss of dependency stated thus:

“...for lost dependency, it is noted that deceased died at the age of 49 years. Considering that he was a business person, it is reasonable to assume that he would have been able to work beyond 60 years statutory age. Consequently, I find that the 11 years proposed by counsel for plaintiff is reasonable and I accept a multiplier of 11 years as appropriate in this case.....”

.....in their submissions the defence appear to accept the fact that the deceased was a miraa businessman. I therefore accept that deceased was not just a driver and consider a sum of Kshs 15,000 earnings per month to be reasonable.”

From the record, the Appellants did not seem to dispute the fact that the deceased was a *miraa* businessman. Also, there is nothing on record to show that the deceased was a driver. Parties agreed to canvass quantum of damages through written submissions. This procedure that was adopted is important consideration in the appeal, as consequently none of the parties adduced evidence thereto. Although the ideal situation would be to produce documents where they are available, but income is not only proved by way of documents. See the decision by the Court of Appeal in the case of **JACOB AYIGA MARUJA & ANOTHER vs. SIMEON OBAYO [2005] eKLR** that:

We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail”.

Based on the law above, even though the Appellants contended that there was no evidence on record to show that the deceased ever worked or operated his own business, it does not mean that the deceased did not have income or that his income cannot be estimated by the court from the material presented before it. If there is evidence which makes an estimation of income possible or knowable will entitle the trial court to make a reasonable estimate; what should be avoided is undue speculation or engaging into speculative arithmetic. Therefore, should the court find that it has barely any or no evidence which may make income knowable, instead of engaging in speculative arithmetic, it should award a global sum and move away from multiplier approach. I should, therefore, state that, where circumstances are not apt, a court of law should never feel beholden to the multiplier approach. Be that as it may; parties relied on submissions. From the submissions of the Respondent, the deceased was a businessman dealing in miraa. The Appellant was of a contrary view. They submitted before the trial court that, as there was no documentary evidence that was adduced to support the fact that the deceased was a businessman in miraa, the court should adopt a sum of Kshs. 10,000 as a reasonable multiplicand. They based their said submission on the assumption that the deceased was a driver and minimum statutory wage for a driver in cities like Nairobi was Kshs. 11,223 before the statutory deductions. Their assessment was coming to Kshs. 400,000 for loss of dependency. In my assessment of the facts of the case, the income of the deceased could be established or was knowable. There was evidence that the deceased dealt in miraa, except documents of income generated from the business were not availed. But as I stated earlier, lack off documentary evidence will not deny a person remedy in law. Accordingly, this was not a case where there was barely any or no evidence of income. However, a sum of Kshs. 30,000 as monthly income would be excessive in the circumstances of this case. Again, a sum of Kshs. 10,000 as monthly income would be too low. In fact the

proposal by the Appellants is based on assumption that the deceased was a driver. Ironically, the Appellants have vehemently attacked reference by the trial court that the deceased was not only a driver, yet they base their proposal on minimum monthly income of a driver which was applicable at the time. As the material to consider is the pleadings and the submissions of the parties, a sum of Kshs. 15,000 would be reasonable in this case. Thus, by arriving at a sum of Kshs. 15,000 as reasonable monthly income for the deceased, the learned trial magistrate did not apply wrong principle. In the circumstances of the case, the said figure was neither inordinately high nor inordinately low so as to be an erroneous estimate. I am now left with the multiplier to apply in the case so that I can ultimately decide whether the entire award for loss of dependency was an erroneous estimate of damages.

[8] The Deceased was aged 49 years when he met his untimely death. The Appellants submitted before the trial court that a multiplier of 5 years was reasonable. The Respondent proposed a multiplier of 11 years. Their proposal on loss of dependency was coming to Kshs. 1,760,000. I will consider the circumstances of this case. First, the Plaintiff is the widow of the deceased. Therefore, the dependency would be for all the expected useful working life of the deceased. Some of the dependants were minors at the time of his death. I will also consider other vicissitudes of life and life expected. Taking all these into account, I am persuaded to expect that the deceased would have worked up to 60 years- this would be the expected useful working age and is also the ordinary retirement age. I will, therefore, apply a multiplier of 11 years. I had already found that the sum of Kshs 15,000 is reasonable monthly income. I have also found that a multiplier of 11 years is reasonable. Accordingly, it is my decision that the trial court in using a multiplier of 11 years upon a monthly income of Kshs. 15,000 for a miraa businessman gave reasonable award. The award of damages given by the trial court on loss of dependency was not inordinately high or low so as to be a wrong estimate. I find no reason to disturb her findings. In the end result I find the Appellants appeal to be without merit and accordingly dismiss it with costs to the Respondents. It is so ordered.

Dated, signed and delivered in court this 31st day of March 2016

F. GIKONYO

JUDGE

In the presence of:

M/s Mwangi for Respondent

Gatavi for Kairaria for Appellant

C/c – Mwenda/Mark

F. GIKONYO

JUDGE