



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 83 OF 2012

SAMMY KIPRUTO ROP.....1ST APPELLANT

AYUB MORII ALIAS KIPRAMOI AYUB.....2ND APPELLANT

VERSUS

FRANCIS CHERUIYOT BARBELIO *sued as the legal*

***representative of* PENINA JEPTOO (*Deceased*).....RESPONDENT**

(Being an appeal from the original judgment and decree of F.N. Kyambia,

Principal Magistrate, in Eldoret CMCC No. 413 of 2011 delivered

on 30th July 2012)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 30th July 2012. Penina Jeptoo (hereafter *the deceased*) died in a road traffic accident on 19th February 2011. Her father, the respondent, brought a suit against the appellants claiming general and special damages.
2. Liability was *settled* in the ratio of 80% to 20% in favour of the respondent. After hearing the evidence, the learned trial magistrate awarded the estate Kshs 10,000 for pain suffering; and, Kshs 100,000 for loss of expectation of life under the Law Reform Act. The court assessed loss of dependency at Kshs 720,000 under the Fatal Accidents Act. Special damages were assessed at Kshs 90,200. The respondent was also granted costs and interest.
3. The appellants have challenged those findings through a memorandum of appeal dated 13th August 2012. There are *nine* grounds of appeal. They can be condensed into *four*. First, that the learned trial magistrate applied wrong principles to assess loss of dependency; secondly, that a global award would have been more appropriate; thirdly, that the award for loss of expectation of life should have been discounted against the award made under the Fatal Accidents Act; and, fourthly, that the award of Kshs 40,000 as legal fees for grant of letters of administration was exorbitant.
4. The appeal is contested by the respondent. The respondent relied on his written submissions filed on 21st September 2015. The respondent contends that the lower court applied the correct formula to assess damages; and, that I should not interfere with the discretion of the learned trial magistrate. I was implored to dismiss the appeal.
5. On 10th February 2015, the court directed that the appeal be determined by way of written submissions. The submissions were to be filed within *twenty one* days. The appellants did *not* file

- submissions until 20th August 2015; well out of time. I deprecate their tardiness. It has occasioned serious delays in this appeal. Like I stated the respondent's submissions were filed on 21st September 2015
6. On 31st May 2016, I heard brief arguments by both counsel. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
 7. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
 8. Like I have stated, liability was *agreed* between the parties in the ratio of 80% to 20% in favour of the respondent. The only live matter in this appeal is *whether* the learned trial magistrate erred in assessment of general and special damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
 9. The respondent's evidence was straightforward. He is a *retired* teacher. He is the *legal representative* of the estate of the deceased. He testified that he obtained a grant of letters of administration. He spent Kshs 40,000 in legal fees. He produced a copy of the grant; and, a receipt for payment for legal fees.
 10. At the time of her death, the deceased was aged *21 years*; and, was a student at Kipkonde Girls High School. The respondent testified that the deceased was an average student; but, she aspired to be a *doctor*. On cross-examination, he conceded that he did not have the deceased's school report forms. He did not also have receipts for Kshs 115,000 claimed as funeral expenses. He however produced receipts for mortuary charges and costs of the police abstract.
 11. That marked the close of the respondent's case. The appellants did *not* lead any evidence in rebuttal.
 12. I will start with the claim for special damages. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Coast Bus Service limited v Sisco E. Murunga and others*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The degree of *certainty* and *particularity* of proof depends on the circumstances and nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716.
 13. The appellant had *specifically* pleaded for special damages of Kshs 155,350 made up as follows: Burial expenses Kshs 115,000; costs of obtaining a grant Kshs 40,000; police abstract Kshs 200; and, death certificate Kshs 150.
 14. The claim for burial expenses was specifically pleaded. But it was *not* fully proved. The respondent simply testified as follows: "*I spent close to Kshs 115,000*". Upon cross-examination, he answered: "*I do not have report showing I spent Kshs 115,000*". The burden to prove the expenses fell upon his shoulders. See section 107 of the Evidence Act. I am alive that documentary evidence is just but one of the means of proving a fact in issue. But Kshs 115,000 was not a petty sum; it could not be proved by a casual remark that the respondent *spent close to Kshs 115,000*. True, a funeral must have taken place. But I am unable to agree with the lower court that the court could take "*judicial notice*" of such expenses in an "*African setting*" and award a "*modest figure of Kshs 50,000*". The only sums strictly proved were Kshs 5,500 for the autopsy at Moi Teaching & Referral Hospital; and, Kshs 3,900 for storage and embalming fees (exhibits 2 [a] and [b]).
 15. The respondent produced a receipt showing he incurred the cost of Kshs 40,000 to obtain a grant of letters of administration (exhibits 3 [a] and [b]). The appellants may have their misgivings about the sum; or, feel it was high. But there was no rebuttal. True, there is a scale provided in the Advocates Remuneration Order. But it provides for *minimum* fees. I thus find that the respondent specifically pleaded; and, strictly proved the cost of obtaining the grant. The same can be said of the sum of Kshs 200 for the police abstract form. It follows that the total special damages *strictly proved* were Kshs 49,600.
 16. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The deceased

- died on the spot. The lower court awarded general damages for pain and suffering at Kshs 10,000 and for loss of expectation of life at Kshs 100,000. The twin awards are *not* inordinately *high* and keep with latest trends on the subject. See generally, Radhakrishnan Khamaney v Murlidhar [1958] E.A 268, Coast Bus service Ltd v Samuel Mbuvi Lai, Nairobi, Court of Appeal, Civil Appeal 8 of 1996 [1997] eKLR, Benedeta Kimani v Cheboi, Nakuru, High Court Civil case 373 of 2008 [2013] eKLR, Rev. Fr. Leonard O. Ekisa & another v Major Birge [2005] eKLR. I will thus not interfere with those awards.
17. The respondent had obtained a grant of letters of administration. Section 4 (1) of the Fatal Accidents Act *expressly* provides that the action can be maintained by the *father* of the deceased. See David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR. The primary reason is that the claim is by a *parent* who has a *reasonable expectation of support* by the deceased.
 18. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See Kemfro v Lubia [1982-88] KAR 727, Rev. Fr. Leonard O. Ekisa & another v Major Birge [2005] eKLR.
 19. The deceased was *twenty one* and in *form four*. There was *insufficient* evidence on how she was performing in school. But I accept that she was an *average* student; and, aspired, against all odds, to be a *doctor*. It is a matter of conjecture to say what she would have exactly turned out to be. But nevertheless her parents had *reasonable expectations* of future support.
 20. Some courts faced with similar situations have used the minimum wage and a reasonable multiplier. In David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR the court used the minimum wage of Kshs 4,000 multiplied by 30 years to reach an award of Kshs 1,680,000. But there are too many imponderables and assumptions in the present case. The learned trial magistrate applied a multiplicand of Kshs 3,000 and a multiplier of 30 years. The multiplier was on the higher side. In paragraph 7 of the plaint, the respondent is stated to be *57 years*; and the wife *48 years*. The respondent testified he was a retired teacher. The deceased's brothers and sisters did not depend on her. It was also not appropriate to subject the amount to a dependency ratio of two-thirds. The learned trial magistrate did *not* discount the award of Kshs 100,000 for loss of expectation of life under the Law Reform Act against the award under the Fatal Accidents Act.
 21. Granted all those circumstances, I am persuaded that the learned trial magistrate applied *erroneous principles*. I think the circumstances of this case demanded a *global award*. Like I have observed, there are too many *imponderables* in the present case to apply a rational multiplicand or multiplier. It is my considered view that a *lump sum* of Kshs 600,000 for *loss of dependency* is more appropriate, reasonable and just. See Mary Nyanchoka v Paul Kiptoo, Eldoret, High Court Civil Appeal 75B of 2009 [2016] eKLR. I will reduce the lump sum by 30% to take care of the *accelerated* payment. The net award under the Fatal Accidents Act is thus Kshs 420,000. Like I stated, the award of Kshs 100,000 for loss of expectation of life under the Law Reform Act must be discounted by the award I have made under the Fatal Accidents Act. The rationale is that both awards end up in the same estate. See Kemfro v Lubia [1982-88] KAR 727. The total award under both Acts is thus Kshs 430,000. To that I would add Kshs 49,600 being the proved special damages.
 22. The upshot is that this appeal is allowed. The judgment and the decree of the lower court are set aside. Liability is entered by *consent* against the appellant at the ratio of 80% and against the respondent at 20%. The summary of the award is as follows-

General damages for pain and suffering.....Kshs 10,000.

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

Loss of dependency.....Kshs 420,000.

Sub-total I.....Kshs 530,000.

Add special damages.....Kshs 49,600.

Subtotal II.....kshs 579,600.
Less (discount) for loss of expectation of life.....Kshs 100,000.
Total award.....Kshs 479,600.
Less 20% contributory negligence.....Kshs 95,920.
Net award.....Kshs 383,680.

23. The upshot is that the appellants shall pay to the respondent Kshs 383,680. I grant the respondent interest on the sum from 30th July 2012, the date of the original decree. Costs follow the event and are at the discretion of the court. I grant the respondent costs in the lower court. Each party shall however bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of June 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by counsel for the appellants.

Mr. Akelo for the respondent instructed by A. K. Chepkonga & Company Advocates.

Mr. J. Kemboi, Court Clerk.