



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 343 OF 2014

PHILIP WANJERA..... 1ST APPELLANT

JOSEPH N. KIAMA..... 2ND APPELLANT

- V E R S U S -

AHMED LIBAN & SHUKRI AHMED LIBAN (Suing for and on behalf of

the Estate of HABIBA LIBAN.....RESPONDENT

(Being an appeal from the judgement of the Honourable magistrate, Mr. Nchoe dated 25th July 2014)

JUDGMENT

1. **Ahmed Liban & Shukri Ahmed Liban** the respondents, filed a compensatory suit before the Chief Magistrates court, Milimani, Nairobi against **Philip N. Wanjera and Joseph N. Kiama**, the appellants herein for the fatal injuries suffered by the deceased **Habiba Liban** following a road accident which occurred on 24th April 2008 involving motor vehicle registration number KAC 851T. According to the respondent, the appellants and/or their servant drove the motor vehicle so negligently that it lost control and ran over the deceased. The appellants filed their defence and denied the respondents' claim. **Hon. T. S. Nchoe** acting Senior Resident Magistrate partly heard and determined the suit. He entered judgement on liability at the ratio of 70:30% in favour of the respondents as consented by the parties and awarded the respondents a sum of ksh.1,800,000/= in damages subject to 30% contribution.

Being aggrieved by the aforesaid decision, the appellants filed the current appeal to have the same impugned.

2. On appeal, the appellants put forward the following grounds on their memorandum of appeal:

1. That the learned magistrate erred in law and in fact in awarding loss of dependency of kssh.1,800,000/= which award was excessive and unwarranted in light of the evidence adduced and after authorities.

2. That the learned magistrate erred in law and in fact in awarding kssh.300,000/= for pain and suffering which award was excessive and unwarranted in light of the evidence adduced and after authorities.

3. That the learned magistrate erred in law and in fact in not finding that the award for loss of expectation of life of kshs.750,000/= was excessive and unwarranted in light of the evidence and cited authorities.

4. That the learned magistrate erred in law and in fact in awarding special damages of kshs.140,995/= which amount was not proved.

5. That the learned magistrate erred in law and in fact in not finding that the special damages claim ought to have been strictly proved by way of production and verification of receipts.

6. That the learned magistrate erred in law in not taking into account entirely the written submissions of the appellant.

7. That the learned magistrate's finding and decision were against the weight of the evidence adduced.

3. When the appeal came up for hearing, learned counsels appearing in this appeal consented to have the appeal disposed of by way of written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions.

4. The parties consented on liability and what is therefore in contention is the quantum awarded in which the appellants claim was excessive in the circumstances.

5. Loss of dependency

In their submissions the respondents aver that the ksh.1,800,000/= awarded as damages for loss of dependency was on the higher side. They argued that at the time of his death the deceased was aged 60 years old and therefore using of a multiplier of 15 years was not justified. They therefore proposed a multiplier of 5 years upon relying on the case of **Joseph Kahiga Gathi and Paul Mathaiya Kahiga (suing as the administrators of the estate of the late Lydia Wanjiku Kagiga and Elizabeth Murugi Kagiga both deceased vs World Vision Kenya & 2 others)(2014) eKLR**, where this court applied a multiplier of 8 years the 1st plaintiff having died at the age of 57 years old. They argued further that the assertions by the respondents that the deceased used to earn ksh.15,000/= was not strictly proved since no evidence was adduced in court by way of documentary evidence not pleaded in the plaint. They averred that in the absence of such evidence, then the court ought to have adopted the minimum wage applicable as at 24th April 2008 which is kshs.5,000/=. They have stated that the deceased was elderly and was survived by adult children and no proof was adduced to show that he had dependants.

6. The respondents on the other hand submitted that the court arrived at ksh.1,800,000/= upon considering judicial authorities including that of **Philip Musyoka Mutua v Veronica Mbula Mutiso (2013) eKLR** where this Court used a multiplier of 7 years for the deceased who was 65 years at the time of his death as well as the case of **Sammy Mweu Mututu v. Philip Mulili Muli & Another (2002) eKLR**. Where the court adopted a multiplier of 5 years when the deceased passed on at the age of 70 years. They therefore argued that a multiplier of 15 is justified. On the issue of the salary of the deceased, they argued that documentary evidence is not the only way in which the sum earned by a deceased could be proved. On this issue, they relied on the case of **Wambua v. Patel & another (1980) KLR** and another Court of Appeal decision in **Jacob Ayiga Maruja & Another v. Simeon Abayo, Civil Appeal No. 167 of 2002**, where the courts held that documentary evidence is not the only way in which the sum earned by a deceased could be proved. They therefore stated the award by the court was appropriate in light of the prevailing and unique circumstances of the deceased.

7. I have considered the arguments of the parties on this head. The question arising here is whether the awarded sum of ksh.1,800,000/= was excessive. According to the court proceedings in the trial court, the parties did not call any witnesses to adduce evidence. They however through a consent recorded in court, put in their respective submissions. According to the respondents submissions, the deceased was a small scale farmer and herder who earned ksh.15,000/= per month which she used to raise and feed her young family. No documentation was produced to show that she earned ksh.15,000/= per month. While I am alive to the fact that a farmer may not have any payslips or books of accounts to prove her earning or any documentation for that matter, the onus of proof rests with the respondent to prove that she was indeed a farmer who earned ksh.15,000/=. There was no evidence adduced to show that she was a

farmer. However, in broad interest of justice I am inclined to apply the Government Minimum Wage Guide for unskilled labourers. The Regulation of Wages (Agricultural Industry) 2008 provides for kshs.5,000/= for unskilled employees.

8. The deceased died at the age of 60 years. The Respondent claimed that she had a young family dependant on her. The dependency ratio of 2/3 has not been disputed by either of the parties.

On the multiplier of 15 years granted by the trial court, I am guided by the case of **Joseph Kahinga Gathii supra and** cited by the respondents, in which this court applied a multiplier of 8 years where the deceased died at the age of 57 years old. The deceased in this appeal was aged 60 years. The multiplier of 15 years used by the trial court is on the higher side. I am of the view that, a multiplier of 7 years is appropriate given that she would have been in a position to work effectively for another 7 years. Therefore loss of dependency will be calculated as: $5,000 \times 12 \times 7 \times 2/3 = 280,000/=$.

9. Loss of expectation of life.

On this head, the appellant submits that the award of kshs.750,000/= awarded on this head was high and excessive. The trial court also failed to explain the principles applied in arriving at the amount. The respondents proposed that a sum between kshs.70,000/= to ksh100,000/= be awarded on this head and relied on the case of **Philip Musyoka Mutua vs Veronica Mbulo Mutiso (2013) eKLR** where this court gave an award of ksh.100,000/= where the deceased died aged 65 years. The respondents on their part submitted that the deceased was deprived of her life and since she was the sole bread winner for her children, then the sum awarded by the learned magistrate was fair. Going by the cited authority by the appellants, I am of the view that the award of kshs 750,000/= awarded by the trial court on this head was high and excessive. The trial court's award is set aside and is substituted with an award of kshs.100,000/= for loss of expectation of life.

10. Pain and suffering

The trial court awarded a sum of kshs.300,000/= under this head. According to the respondents the deceased was admitted in hospital for a period of 11 days, where she had her leg amputated. They claimed that she suffered a fractured humerus of the right forearm and bruises and lacerations on the left knee, upper limbs and face, hence she was under immense pain. They cited the case of **S. J. Chege & Another vs Johanna W. M. Vesters and Another (1982 – 88) K.A.R 1197** where the plaintiff was awarded kshs.550 000 under this head having been in the Intensive Care Unit for 14 days and the case of **Elisha Busienei v Paul Yator (2012) eKLR** where the Court of Appeal awarded kshs.100,000/= for pain and suffering where it was evident that the deceased did not die immediately after the accident. On this head, I wish to rely on the case of **P.N.M & Another (the legal personal representative of estate of L.M.M vs. Telkom Kenya Limited & 2 others (2015) eKLR** where a deceased who survived for 6 days before his demise was awarded a sum of ksh.100,000/=. Given that the deceased passed on after 11 days an award of ksh.300,000/= is on the higher side. I am convinced that a sum of ksh.150,000/= would be sufficient in the circumstances.

11. Special damages

It is trite law that special damages must not only be specifically pleaded but must be strictly proved. The respondents pleaded special damages of ksh.140,955/=. They further adduced photocopies of the receipts to prove their case in the trial court which copies form part of the record of appeal. However the same are quite blurry. However, looking at the submissions of the parties as filed in the trial court, it is clear that receipts were produced in court. The Appellant did not challenge the fact that the receipts were produced only that they were photocopies and not the originals. The Trial Magistrate before awarding the special damages stated in his judgement that he had perused the receipts placed before him and proceeded to award the sum of kshs 140,955/=. The photocopies of the receipts as contained in the record of appeal though not very clear indicate that there were hospital bills paid and most likely the post-mortem expenses. What might have been absent were probably the funeral expenses receipts which have not been annexed, Nonetheless, it goes without saying that funeral expenses must have been incurred since the

deceased was buried. Despite the fact that the receipts were not attached as proof of funeral expenses, an award towards funeral expenses ought to be made. The Court of Appeal in the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR**, the court held *inter alia*:

"We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case."

In another Court of Appeal case i.e **Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR**, the Court of Appeal said that:

"We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved..."

The Court of appeal proceeded in this case to uphold a sum of kshs 150,000/=, awarded by the trial judge by holding that:

"...The learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages..."

In the present case, the Respondent sought Kshs 100,000/= as funeral expenses. Though they did not adduce any evidence in relation to the expenses incurred, I am convinced in the light of the Court of Appeal decisions cited above that a sum of kshs 100,000/= is fair and I hereby uphold the award on special damages as awarded by the trial court

12. In the end, I allow the appeal and hereby set aside the decision on quantum by substituting it with an award of ksh.469,668.50/= to the respondents. The aforesaid award is tabulated as follows:

a. General damages on loss of dependency	ksh.280,000/=
b. General damages on loss of expectation of life	ksh.100,000/=
c. General damages on pain and suffering	ksh.150,000/=
d. Special damages proven	kshs.140,955/=
Gross total	<u>ksh.670,995/=</u>
Less 30% of the total	ksh.201,286.50/=
Net Total	Ksh.469,668.50/=

13. I also award costs of the suit and appeal to the respondents.

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondents