



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C.A 96 OF 2013

1. JULIUS MUIGA NJIHIA

2. DANIEL MUTUMA BURURI APPELLANTS

VERSUS

DANIEL KIMANTHI MUTISO (*Suing as the father and personal*

***representative of the Estate of FRANCIS MUOKA -Deceased*).....RESPONDENT**

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Kithimani by Hon. D.G. Karani (PM) in

Civil Case No. 51 of 2011 dated 8TH May 2013)

JUDGMENT OF THE COURT

1. Vide a **Plaint** dated 30th May 2011 and filed in the trial court on 2nd June 2011, the Plaintiff (father of the deceased Respondent herein) filed the claim therein for special damages, general damages under both the **Law Reform and Fatal Accident Act**, costs and interest, on the grounds that the Appellant negligently caused the death of the deceased. In due course parties reached a consent on liability at 50:50, and the only issue left for the trial judge to determine was quantum, which the learned trial magistrate determined.

1. Being dissatisfied with the judgment on quantum the Appellants appealed against the same giving the following grounds of appeal:-

- i. That the learned trial magistrate erred in law and in fact by awarding manifestly excessive general damages under the Law Reform Act and the Fatal Accidents Act.**
- ii. That the learned trial magistrate erred in law and in fact in taking into consideration speculative allegations on the life prospects of the deceased in adopting a multiplicand and multiplier that were excessive and incongruent with the evidence that had been led and the relevant law governing assessment of damages for lost years/loss of dependency.**
- iii. That the learned trial magistrate erred in law and in fact in failing to subject the proven special damages to the agreed concession on liability.**

iv. That the learned trial magistrate erred in law and in fact in failing to take into consideration and deduct the award under the Law Reform from the award under the Fatal Accidents Act.

v. That the learned trial magistrate failed to appreciate and consider the Appellants submissions on the issue of duplicity of awards and in particular the case of *Kemfro Africa Limited T/a "Meru Express Services (1976)" & Another –vs- Lubia & Another (No 2) [1987] KLR* which was binding on him.

3. The Appellants pray for the following orders:-

a. That the appeal be allowed.

b. That the court to proceed and determine the issue of quantum under the Law Reform Act and the Fatal Accidents Act as follows:-

i. Pain and Suffering	Kshs.	10,000.00
ii. Loss of expectation of life	Kshs.	120,000.00
iii. Lost years	Kshs.	1,500,000.00
Total	Kshs.	1,630,000.00
Less 50%	Kshs.	815,000.00
Add Special Damages	Kshs.	58,800.00

and cost of the suit and interest given to the

Plaintiff	Kshs.	873,800.00
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c. That the Special damages awarded be subjected to the agreed concession on liability.

d. That the award under the Law Reform Act be taken into consideration and deducted from the award under the Fatal Accidents Act.

e. That the Appellant be awarded costs of this appeal.

4. With the leave of court the appeal was canvassed through written submissions. The Appellant filed their submissions on 18th July 2016 while the Respondent did that on 6th July 2016.

5. I have considered the appeal and submissions. The issues I raise for determination are the same as those raised in the grounds of appeal and I will address them as such.

6. The trial magistrate used the sum of Kshs.15,000/= and rejected the Appellants' submissions that the minimum wage presented a realistic gauge for assessing the claim for dependency. In adopting the sum of Kshs.15,000/= as the multiplicand, the trial magistrate adopted the reasoning that the deceased would have earned a salary that was higher than the minimum wage regime as proposed by the Appellants. The Appellants submitted that the evidence of PW1 presented two professions that the deceased was alleged to have aspired to become. The evidence as presented did not therefore confirm with certainty the aspirations of the deceased. There were some speculative tendencies in the ultimate career choices of the deceased and hence the Appellant submitted that the deceased was still in his formative stages of career development. Had the situation been that the deceased had graduated from High School and joined a college, then the career progression would have crystallized and certainty would have been achieved. It was submitted that it was not safe for the trail magistrate to speculate on the ultimate career choice of the

deceased and that the same amounts to an error in law and fact.

7. It was the Appellants' request that the court considers the principles set out in the **Court of Appeal Case of Sheikh Mushtaq Hassan – Nathan Mwangi Kamau Transporters & 5 Others 1982 – 1988 1KAR** where **Kneller J.A.** set out various principles that should be taken into account when assessing damages in cases where the deceased person is young. Among the principles that the learned judge set out are that:-

a. The sum awarded is never a convectional one but compensation for a pecuniary loss.

b. It must be assessed justly and with moderation.

c. Disregard and remove inscrutable speculative claims.

d. Still on the issue of assessing damages, **Justice Kneller** adopted with approval the dicta in the case of **Gammel –vs- Wilson** that:-

‘...if sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probability which matters...’ and again later on in it:

‘...subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live are out of place, the judge must make the best estimate on the known facts and his prospects at the time of his death.’

9. The Appellant submitted that the trial magistrate did not assess damages for loss of dependency justly and with moderation considering the dicta in the **Sheikh Mushtaq Hassan** case. It was submitted that by the fact that the deceased was still a student, the adoption of Kshs.15,000/= as the multiplier on the presumption that the deceased would have become a teacher led to the court engaging in speculation especially noting that it was also alleged that the deceased aspired to become an engineer.

10. It was also submitted that there were no sufficient facts to support the alleged multiplier and the court engaged in speculation and thus erred in law and fact. The Applicant prayed that the court finds merit on grounds 1 and 2 as set out in the Memorandum of Appeal and allow the same. Having submitted so, they prayed that the court holds that the sum of Kshs.6,221/= being the minimum wage of a general labour presented certainly in terms of the income of the deceased. The minimum wage regime has been adopted by various courts in assessing the award for dependency in cases where the deceased aspired to become a teacher as demonstrated in the case of **Grace Wanjiru Gichuki –vs- Peter Gateru Macharia [2004] eKLR**

11. In this case the deceased was alleged to have had aspirations of being a teacher. The learned judge held that the same was speculative and adopted the minimum wage of Kshs.3,000/= in assessing damages for loss of dependency. The trial court's adoption of a multiplier of 25 years and the ratio of 1/3 were reasonable to the Appellant.

12. In respect to ground 3 of the appeal, it was submitted that on 24th October 2012, parties recorded a consent judgment on liability wherein the same was apportioned at the ratio of 50:50.

13. The effect of the judgment being that whatever was to be found due to the Plaintiff, the same was to be subjected to a 50% contribution.

14. It was noted that the court failed to subject proven special damages of Kshs.58,800/= to the agreed concession on liability and by extension judgment on special damages was adjudged by the court at 100% against the Appellants. The award of special damages thus varied the consent of the parties as had been recorded on liability and the Appellant submitted that the same amounted to an error on the part of the

court. The Appellants prayed the court to find merit in ground number 3 of the appeal and proceed to subject the proven special damages to the agreed concession on liability.

15. In respect to ground number 4 and 5, it was the Appellants' submission that the Court of Appeal settled the issue of duplex awards in the case of *Kemfro Africa Limited –vs- Lobia 1987 [KLR]*. It was pleaded at paragraph 9 of the Plaint that the dependants of the deceased were **Daniel Kimanthi Mutiso** and **Mary Mbula Kimanthi** who were the father and mother of the deceased respectively. The said persons were claiming damages under the **Law Reform Act** and the **Fatal Accidents Act**.

16. The Appellants submitted in the subordinate court that the award under the **Law Reform Act** ought to have been taken into account when the court was assessing damages under the **Fatal Accidents Act**. The court however failed to address its mind on this issue at all and thus erred in law and fact.

17. In response, the Respondent merely denied the grounds of appeals and did not make any meaningful submissions on the law or on the appeal.

18. Be that as it may, this court is of the view that it cannot interfere with the finding of the trial court on the mode of assessment of damages. The trial court's finding on the career path of the deceased was not speculative. The deceased was a bright student. This was proved. He could end up being a teacher, an engineer, an accountant, a successful businessman, or President. The unmitigated adoption of the minimum wage would amount to saying that the deceased would only have been a casual labourer. The minimum wage principle can still apply in some cases. In this case, however, the trial court gave reasons why it did not adopt the minimum wage principle, and this court will not interfere with that.

19. On the issue of subjecting special damages to the agreed ratio of 50:50 liability, this court agrees with the Appellant. Once parties agree on ratio of liability the same applies to both special and general damages.

20. In respect of grounds 4 and 5 the Applicant submitted that the Court of Appeal settled the issue of duplex awards in the case of *Kemfro Africa Ltd vs. Lobia* above.

21. However, I hasten to note that this is a disputed issue, and there are two schools of thought. **Section 2(5)** of the **Law Reform Act** states that damages given under the **Law Reform Act** are in addition and not in derogation of any rights given to the dependents under the Fatal Accidents Act. This provision of the Act appears to be in contradiction of the finding of the Court of Appeal in the *Kemfro case*. However, in my view the law is clear on the issue. In any event sources of Kenyan Law are hierarchical in nature. The Constitution is at the Apex followed by Acts of Parliament and then precedent as sources of our law. It is important that the Court of Appeal revisits the issue in view of the said conflict between the Act and the said Court of Appeal decision. I have also noted that courts have disregarded the Court of Appeal in this regard. In the case of *Bennedeta Wanjiku Kimani vs Chengwon Cheboi & Anor. HCCC. No. 373/08 (eKLR)* Justice Emukule upheld the statutory provisions of **Section 2(5)** of the **Law Reform Act**. I hereby do the same.

22. In the upshot, save that the special damages awarded by the trial court shall be subject to the agreed concession on liability, the appeal is dismissed with costs to the Respondent.

That is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 26th DAY OF OCTOBER 2016.

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E. OGOLA

JUDGE

In the presence of:

Mr. Mbithi holding brief for M/S Mutunga for Respondent

Mr. Nyandieka holding brief for Mr. Kiplagat for Defendant

Court Assistant – Mr. Munyao