



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 133 OF 2010

BEATRICE NJERI MAINA.....APPELLANT

VERSUS

AUGUSTINE MAINA NGETHA.....RESPONDENT

(Being an appeal against part of the judgment in Nyeri Chief Magistrates' Court

Civil Case No. 673 of 2008 (Hon. S. Muketi) delivered on 30th June, 2010)

JUDGMENT

The appellant succeeded in a suit she filed in the lower court against the respondent for damages, both special and general arising from a road traffic accident which occurred along Karatina-Sagana road on or about 23rd October, 2007. In the accident, the appellant's husband was knocked down by the respondent's motor-vehicle registration number KAQ 662 A and sustained injuries to which he succumbed and died on the spot.

At the conclusion of the trial, liability for the accident was apportioned between the respondent and the deceased at the ratio of 80:20. As far as quantum of damages is concerned, the trial court made the following award:-

(a) Pain and suffering	Kshs. 15,000/=
(b) Loss of expectation of life	Kshs. 100,000/=
(c) Special damages	Kshs. 6,000/=
(d) General damages for	
Loss of dependency	<u>Kshs. 216,000/=</u>
Total	Kshs. 337,000/=
Less 20% contribution	<u>Kshs. 67,440/=</u>
Net Total	<u>Kshs. 269,760/=</u>

The deceased was aged 37 and so in calculating general damages for loss of dependency the learned magistrate opined that the deceased would have worked up to the age of 55 years. She also found as a fact that the deceased was earning a sum of Kshs. 3,000/= per month and out of this sum, he spent a third of it on his family. The learned magistrate therefore adopted a multiplier of 18 and a multiplicand of 3,000 and arrived at the figure of Kshs. 337,000/= (subject to contribution), under the head of loss of dependency.

It is this aspect of the judgment that the appellant is dissatisfied with; according to the appellant, there was no basis for the learned magistrate to come to the conclusion that the deceased only spent a third of his income on his family. To the contrary, it is the appellant's view that, from the evidence available, the deceased spent two-thirds of his income on his family and the learned magistrate had no reason for holding otherwise. And so in his appeal to this court, the appellant faulted the learned magistrate's decision on the following grounds:-

1. The learned trial magistrate erred in law and in fact in determining that a third of the deceased's earnings would go to supporting the family instead of two thirds;
2. The learned trial magistrate erred when she opined that 18 years would be a reasonable multiplier;
3. The learned magistrate's award of damages was manifestly low.

The general principle applicable in considering an award of damages at this appellate stage is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where trial judge, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms:-

“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 or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

Evidence was led to the effect that the deceased used to earn Kshs. 3,000/= per month; it appears from the submissions by both counsel for the appellant and the respondent that this figure was not in dispute and was accepted as the deceased's monthly income prior to his death. The only question is whether the learned magistrate was correct in finding that the deceased spent a third of it on his family. The best place to find the answer to this question is from the evidence on record.

The deceased's widow testified that her marriage to the deceased had been blessed with one child and she produced a birth certificate to support her testimony. As far as his support to the family is concerned the witness testified as follows:-

“He used to get Kshs. 3000/= per month. He used to help me. I no longer have such assistance...”

“He used to buy me foods and clothes...he used to give me Kshs. 700/=. This is what I would use with my child. Macharia has parents. None of them is in court...”

This evidence was not controverted and in the absence of contrary evidence, I would suppose that if the deceased could give his wife Kshs. 700/= per month and buy her clothes and also cater for food for the family, the finding by the learned magistrate that the deceased spent Kshs.1000/= (which is a third of his income) only on the family is against the available evidence. I appreciate that no evidence was led on the kind of clothing that the deceased used to buy his wife and neither was the court told of the type of food he was feeding his family on; however, even if one was to assume that the clothing and the food that the deceased spent his money on were the cheapest of all, there is no way that the deceased's expenses on

these items in addition to the stipend of Kshs. 700/= he used to give his wife, would add up to only a third of his monthly income. From the evidence available, the least that the deceased would spend on his family would be two-thirds of his salary and, in my view, to the extent that the learned magistrate came to the contrary conclusion, I am persuaded that, as was said in ***Bashir Ahmed Butt v Uwais Ahmed Khan case (supra)***, the learned magistrate “***misapprehended the evidence in some material respect and so arrived at a figure which was inordinately low***” in the circumstances of this case. I would agree with the appellant in this regard and substitute the award of a third of his income for loss of dependency with two thirds.

As far as the multiplier of 18 years is concerned, I find that there is no basis to disturb it because the learned magistrate considered the relevant factors before arriving at this figure; she took into account the preponderance or vicissitudes of life and the probable active and working life of the deceased. There is no evidence that she proceeded on the wrong principles or misapprehended the evidence in this respect. I would uphold her finding on this issue based on the same reasoning in ***Bashir Ahmed Butt v Uwais Ahmed Khan (supra)*** and the ***Nakuru High Court Civil Appeal No.142 of 2009, Comply Industries Limited versus Daniel Kiprotich Busienei*** cited by counsel for the respondent in which Emukule, J adopted a multiplier of 20 yet the deceased was aged 21.

Based on the reasons have given, I would award the appellant the sum of **Kshs.432, 000/=** under the head of loss of dependency worked out as follows:-

Kshs. (3,000 x 12 x 18 x 2/3) = 432,000/=

The final award would therefore be as follows:-

Pain and suffering	Kshs. 15,000/=
Loss of expectation of Life	Kshs. 100,000/=
Loss of dependency	Kshs. 432,000/=
Special damages	<u>Kshs. 6,000/=</u>
Total	Kshs. 553,000/=
Less 20% contribution	<u>Kshs. 106,400/=</u>
Net total	<u>Kshs. 442,600/=</u>

The appeal partly succeeds to the extent of the variation of the award under the head of loss of dependency and for this reason parties will bear their own respective costs in this court; however, as for the suit in the subordinate court, the appellant shall have the costs of the suit and interest therefore at court rates from the date of judgment. It is so ordered.

Signed, dated and delivered in open court this 22nd May, 2015

Ngaah Jairus

JUDGE