REPUBLIC OF KENYA

KENYA LAW

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 59 OF 2013

(An appeal from the Judgment of the Ag. Principal Magistrate, Embu in CMCC No. 194 of 2011 dated 23/10/2013)

GACHOKI GATHURI (Suing as Legal Rep. of the Estate of

JAMES KINYUA GACHOKI (Deceased) .....APPELLANT

VERSUS

JOHN NDIGA NJAGI TIMOTHY..... 1ST RESPONDENT

KENNETH KABUKU KAMANDE.....2ND RESPONDENT

AUTOSIL (K) LTD.....3RD RESPONDENT

J U D G M E N T

This is an appeal against the judgment of the Ag. Principal Magistrate, Embu delivered on 23/10/2013 in CMCC No. 194 of 2011. Liability was apportioned at 70:30 in favour of the appellant against the respondents whereas an award of KShs.68,163/= was made in favour of the appellant.

The appellant's claim was for damages under the Fatal Accident Act and the Law Reform Act. The claim arose from a road traffic accident which occurred on 24/6/2010 along Embu - Nairobi road at Makutano involving vehicle registration No. KBJ 752 F. The vehicle belonged to the 3rd defendant and was driven by the 1st defendant.

It was alleged that the vehicle was so negligently driven that it caused an accident in which the deceased was knocked down and died while riding a donkey cart. The 2nd defendant was said to be in control and in possession of the vehicle. The 2nd and 3rd defendant were sued vicariously for the acts or omissions of the 1st defendant.

The appellant relied on the following grounds:-

1. *That the magistrate erred in failing to consider the lengthy submissions and authorities tendered before court by the plaintiff and the defendant thereby arriving at a decision that was manifestly low.*
2. *That magistrate erred in awarding the appellant a sum of KShs.68,163/= after contribution despite the evidence adduced by the appellant and suit being under Law Reform and Fatal Accidents Act.*

3. *The magistrate erred in failing to appreciate that the deceased was aged 29 years at the time of death and the appellant depended on him hence arriving a wrong conclusion.*

4. *The magistrate erred in failing to appreciate the case law provided by the appellant in awarding under Fatal Accident and Law Reform Act.*

5. *The award by the trial court was manifestly low.*

The appeal was argued by way of written submissions. The appellant was represented by Shem Kebongo & Company Advocate while the K. Itonga represented the respondents.

The appellant in his written submissions stated that the parties had recorded a consent on liability. Both parties filed submissions on the issue of quantum. On pain and suffering the court awarded the appellant Ks.40,000/= which was reasonable since the deceased died in hospital.

The appellant argued that the magistrate acted on wrong principles in awarding KShs.50,000/= for loss of expectation of life and for failing to make an award for loss of dependency. It was further argued that the award for loss of expectation of life was manifestly low. The formula adopted by the court was not suggested by any of the parties which means the submissions were ignored. The appellant proposes that the magistrate should have awarded KShs.120,000/= taking into account that the deceased was 29 years and in good health.

The appellant relied on two authorities of ***SILAS MUGENDI NGURU VS NAIROBI WOMENS HOSPITAL [2014] eKLR*** and ***JAMES GICHURU KUNJURU VS MAINYO INVESTMENTS LTD Nairobi HCCC No. 1681 of 1999***. In the said authorities the deceased died at the age of 29 years and the court made awards of Kshs.150,000/= and 100,000/= respectively for loss of expectation of life.

The appellant argues that the magistrate erred in failing to award any sum for loss of dependency on the ground that the deceased had no dependants. A parent is recognized as a dependant under Section 4 of the Fatal Accidents Act. The appellant gave evidence that the deceased was earning KShs.8,000/= and was supporting him. This evidence was not rebutted by the respondent.

In the absence of documents to support the earning of the deceased. It is argued that the court should have adopted Regulation of Wages (General Amendment) Order and used the minimum wage of KShs.6,211/=. The appellant cited two authorities in support of this argument but did not attach them.

The deceased having died at the age of 29 years would have worked until retirement age of 60 years if he remained in good health. For this reason, the appellant submitted that the submitted that the court ought to have adopted a multiplier of 30 years.

The deceased was survived by his father whom he also supported and ought to have been accepted as a dependant. For this reason the court ought to have adopted the dependency ratio of 2/3.

The appeal was opposed by the respondents who argued that the court should not interfere with an award of

damages made by the court unless based on wrong principles, or were manifestly low or inordinately high citing the following cases:-

1. ***KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHONGO KANINI VS A.M.M. LUBIA & ANOTHER [1985] eKLR***

2. ***CECILIA MWANGI & ANOTHER VS RUTH W. MWANGI [1997] eKLR***

It was further argued that the magistrate rightly omitted to award damages on loss of dependency based on the ground that the deceased had no dependant.

On the issue of the multiplicand, the appellant failed to produce a pay slip to show the earnings of the deceased. The respondents proposed that the minimum wage in rural areas of KShs.3,597/= should be adopted. In this regard the respondent relied on the case of ***NJUE GITONGA VS EDWARD NYAMU KIBUNYU (suing as the legal representative of the estate of Peter Njinju Nyamu [2015] eKLR***.

The respondents argued that the multiplier of 25 years was reasonable. In the case of ***SILAS MUGENDI (supra)*** the same multiplier was used where the deceased died at the age of 29 years.

The dependency ratio of 1/3 was appropriate in the circumstances.

The duty of the first appellant court was explained in the case of ***KENYA PORTS AUTHORITY VS KUSTON (KENYA) LTD [2009] 2 EA 212*** where the Court of Appeal held inter alia that:-

> "*On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".*

The appellant in his statement said that he was informed that his son the deceased had been knocked by a vehicle at Makutano and had been taken to Karira Mission Hospital. He died as a result of the said accident about two days later. The accident occurred on 24/6/2010 and the deceased died on the same day.

The accident was reported at Makutano police station where the appellant was issued with a police abstract. The appellant stated that his son was aged 29 years at the time of his death.

PW2 was the eye witness and a brother to the deceased. He stated that his brother was killed while riding a donkey cart. PW2 was riding a bicycle following the donkey cart. The deceased was knocked by vehicle registration No. KBJ 752 F coming from Embu direction. The vehicle was at a high speed and was driven carelessly before it lost control and hit the donkey cart as a result of which the deceased was injured.

Among the documents annexed to the appellant's statement was the police abstract, limited letters of administration ad litem, death certificate, demand letter, notice to sue, a court fees receipt and copy of records.

The respondent did not tender any evidence or file any witness statement to accompany the defence. However,

they filed a list of documents which they named as the driving licence of the 1st respondent and aany other relevant documents.

The parties entered consent on liability at the ratio of 70:30 in favour of the appellant against the respondent. The written submissions on quantum were filed by both parties.

This appeal is only against quantum of damages. An appeal court may interfere with the award only in certain circumstances. I rely on the case of ***DENSHIRE MUTETI WAMBUA VS KPLC LTD Civil Appeal No. 2004 eKLR*** *where the case of* ***KENFRO AFRICA LTD VS A.B. LOBIA & ANOTHER [1988] 1 KRA 777*** Kneller J.A. was cited

"*The principles to be observed by an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Appeal Eastern African to be that it must be satisfied that*

(a) *The judge in assessing the damages took into account an irrelevant factor or*

(b) *Left out of account a relevant one or (3) that short of this the amount is inordinately low or so inordinately high that it must be an erroneous estimate of the damages".*

The appellant did not raise any issues with the award for special damages and that of pain and suffering.

On loss of expectation of life the magistrate said that the age of the deceased was not proved. He proceeded to award a flat figure of Shs.50,000/= based on the reason that the court would not know when the deceased would die if he was to die of natural causes.

The appellant's statement contained evidence that the deceased was aged 29 years. The appellant is the father of the deceased who is presumed to know the age of his son. This presumption can only be rebutted by other evidence. The respondents did not file any witness statement and in their submissions, they did not dispute the age of the deceased even in their submissions..

The appellant argued that the trial magistrate did not consider the submissions of the parties in his judgment. I have perused the brief judgment of the magistrate. He summarized the submissions but did not cite a single case relied on by any of the parties.

In regard to the authorities, the magistrate put it in on sentence:-

"*Let me state that I have considered the authorities submitted. I award general damages as follows:-"*

it is appreciated that the award of damages was at the discretion of the trial court, but this discretion must be exercised judicially. The learned magistrate did not consider any of the authorities cited by the counsel for the parties so as to guide himself on the assessment of the damage. I am convinced that if he had done so, he would have reached a different assessment. The award was so inordinately low that it calls for interference by this court following the principles set out in the ***DENSHIRE MUTETI WAMBUA*** case.

The appellant's evidence as to deceased's was corroborated by his death certificate of the deceased which gave his age as 29 years. The magistrate did not analyze the evidence before him as borne by the record. It is my considered opinion that the evidence on record was sufficient proof of age.

The appellant further argued that the age of the deceased was proved as 29 years. It was therefore wrong for the magistrate to hold that it was not proved. The evidence of his father and that of the death certificate showing age as 29 years is sufficient proof. The award of a flat figure of Shs.50,000/= for loss of expectation of life was therefore based on wrong principles. For this item and based on the age of the deceased I award Kshs.100,000/= for loss of expectation of life.

For loss of dependency the magistrate failed to award any sum because the earnings of the deceased were not proved. The appellant and his son John Kariuki Gachoki in their statements stated that the deceased was riding a donkey cart at Makutano. He was said to be a casual labourer and a farmer. In his submissions the appellant said that the deceased was earning an average of Kshs.8,000/= a month which he used to support his parents and siblings. It is not in dispute that the deceased worked as a casual labourer and a farmer.

It is trite law that where there is no proof of income, the court will adopt the minimum wage provided in the Regulations of Wages (General Amendment) Order. The appellant in his submissions in the trial court proposed a figure of Shs.6,221/= using the minimum wage as a guide. The respondent had proposed a figure of Shs.6,000/= based on the minimum wage guidelines. It was wrong for the magistrate to fail to award the figure of Shs.6,000/= which was not disputed. I find it appropriate that Shs.6,000/= be adopted which I hereby do.

The court also failed to recognize the parents of the deceased as dependants. The deceased was a bachelor but the appellant being a parent said he depended on his son. This finding was based on disregard of the fact that most parents depend on the support of their children especially at old age.

I take note of Section 4(1) of the Fatal Accidents Act which recognizes wife, husband, parent and child of the deceased as dependants entitled to benefit from any suit brought under the Act. I reach a finding that the appellant proved that he and his wife were dependants of the deceased.

The appellant relied on two cases. In the case of ***JAMES GICHURU KIUNJURI (supra)*** the court adopted a multiplier of 30 years whereas the deceased was aged 25 years. In that of ***DANIEL MUGARU KURIA (supra)*** the deceased died at the age of 23 years and a multiplier of 29 years was adopted.

The respondents in the current submissions urged the court to adopt a multiplier of 25 years. I note that the magistrate did not come up with any multiplier. All considered, I adopt the multiplier of 25 years which I find reasonable considering the foregoing analysis. The deceased being was unmarried but had depentants. I therefore adopt the ratio of 2/3.

The damages for loss of dependency are calculated thus:-

6000x25x12x2/3 = 1,200,000

Judgment is hereby entered in favour of the appellant in the the following terms:-

1. Loss of dependency - 1,200,000
2. Loss of expectation of life - 100,000
3. Pain and suffering - 40,000
4. Special damages - 7,375

1,347,375

Less 30% contribution 404,212

943,162

The net damages payable to the appellant by the respondents jointly and severally is Kshs.943,162/=.

The respondents will meet the cost for this appeal and the court below.

The appeal is allowed accordingly.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Mugunya for respondents