



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 7 OF 2013

KENNETH M. NGAI.....APPELLANT/APPLICANT

VERSUS

MILCAH WANGUI MBUGUA.....1ST RESPONDENT

CAROLINE NDUTA KINYIRA2ND RESPONDENT

(As administrator of the estate of IGNATIUS KINYIRA KANYUNGU)

(An appeal from the Judgment/Decree of M. WACHIRA Chief Magistrate Embu in CMCC No. 284 of 2009 of 19th January 2013)

J U D G M E N T

The appellant lodged an appeal against the judgment of Embu Chief Magistrate in CMCC No. 284 of 2009 delivered on 29/1/2013. In his memorandum of appeal, the appellant relied on the following grounds;

1. *That the multiplicand of Kshs.60,000/= used by the trial magistrate in computing damages for loss dependence was not supported by any evidence;*
2. *That the magistrate awarded KSHS.79,610/= for special damages while only Kshs.38,810/= was proved and disregarded the fact that the respondent had pleaded for special damages of Shs.54,610/= thereby making a wrong decision;*
3. *That the magistrate failed to deduct the awards under the Law Reform Act from the whole award hence giving the respondent a double payment;*
4. *That the magistrate used deceased's payment of his children's school fees as proof of earning which was wrong;*
5. *That the magistrate failed to consider all documents and submissions of the defendant in her judgment.*

The appeal was disposed of by way of written submissions. Ms. Kinyua Muriithi & Co. represented the appellant while the respondents were represented by Messrs Ndumu Kimani & Co. Advocates. Both sides filed submissions and cited authorities in support of their cases. The appellant urged the court to set aside the judgment of the trial court and award Kshs.245,286/= being special and general damages after deducting 40% contribution and that the respondent be condemned to pay costs of this appeal and in the court below.

The appellant submits that he proposed a multiplicand of Shs.7,500/= being the basic salary under the Employment Act since no evidence of business of the deceased was produced. The respondent's evidence was that the deceased was a private motor vehicle assessor earning Kshs.60,000/= per month from his business. Before the deceased started the business he was working at Express (K) Ltd where he earned a monthly salary of Kshs.39,620/=. The respondent did not produce any documentary evidence to prove her claim. She did not produce any trade licence or certificate for the said business. There was no tenancy agreement produced and neither did she know the name of the building where her husband carried on business. The deceased was not paying income tax to Kenya Revenue Authority since no documents to that effect were produced. The appellant claimed that failure to pay tax was an offence and that the court should not be used to help a party in a case where an offence had been committed as he cited the case of **ALLAN NJUGUNA VS VERONICA NYAMBURA & 2 OTHERS Court of Appeal Civil Appeal No. 165 of 1993**. In the absence of any evidence of income, the appellant argued that the minimum wage under the Employment Act should be applied in assessing loss of earnings.

As for special damages, the appellant argued that the respondent submitted for Shs.56,610/= and it was an error for the court to award KShs.79,610/=. It is a requirement of the law that where a court awards damages under the Fatal Accidents Act and the Law Reform Act, the damages under the Law Reform Act must be deducted in full.

The respondent submitted that the evidence of PW1 was sufficient to prove that the income of the deceased was Shs.60,000/= She produced documents to show that the deceased worked with Express (K) Ltd earning Kshs.39,620/= before venturing into private business. The failure to produce tenancy agreement and tax records by PW1 does not mean that the deceased did not do any business or that he did not pay any tax. The respondent relied on the case of **NAIROBI HCCC NO. 316 OF 1990 MWEKE E. MARONA VS SHAGUE HAQ & OTHERS** to show that it is trite law that documentary evidence of earnings is not the only way to prove that the deceased earned income. In the case of **NAKURU HCCC NO. 252 OF 2002 IRENE KAGONDU & ANOTHER VS W.K. TILEY (MUTHAIGA) LTD & ANOTHER** where the court relied on expenses of the deceased in computing loss of earnings.

The duty of the first appeal court herein is to analyze, re-evaluate the evidence of the trial court and make its own conclusions with a view of establishing whether the trial court reached the wrong finding. It was held in the case of **SELLE & ANOTHER VS ASSOCIATED MOTORS BOAT CO. LTD & OTHERS [1968] EA 123**

“The court is not bound to follow the trial court's findings of fact if it appears that the court failed to take into account particular circumstances of the case. The appellate court must reconsider the evidence, re-evaluate it and draw its own conclusions.”

The issues for determination in this appeal are as follows:-

1. *whether the trial magistrate erred in using the multiplicand of 60,000/=*
2. *whether the award under the Law Reform Act ought to have been reduced from the award under Fatal accidents Act;*
3. *whether the special damages of Shs.79,610/= were rightly computed and awarded.*

The respondent in his plaint pleaded for special damages of Kshs.130,250/= for police abstract, death certificate, funeral expenses and letters of administration. The receipts produced were for Kshs.54,610/=.

The court rejected the receipt for grant of representation of Shs.10,000/= on grounds that it may have been paid elsewhere. The rejection was based on wrong reasoning in that the expense was incurred in an ex parte application where costs could not be claimed. However, the respondent did not appeal against this decision and this court does not wish to disturb that finding. The amount awarded for funeral expenses was Sh.44,410/= plus Shs.25,000/= for unreceipted expenses equals to Kshs.69,610/=. The respondent testified that she paid Kshs.25,000/= for the coffin and hearse but misplaced receipt. It is

within public knowledge that a coffin and a hearse must be in most burials in this country. It is not in all cases that families will keep receipts for burial expenses. I rely on the case of **PREMIER DIARY LTD VS AMARJIT SINGH SAGOO & ANOTHER [2013] eKLR** where the court took judicial notice of various burial expenses and awarded Kshs.150,000/= in the absence of receipts.

I find that the trial magistrate was entitled to recognize and award the Shs.25,000/= for purchase of the coffin and the hearse. However, it was wrong for the magistrate to include the receipt of Kshs.10,000/= expense she had rejected. Special damages payable ought to have been Kshs.69,610/=.

The plaintiff had pleaded for Shs.130,250/= and it was within the law for the court to award Kshs.69,610/= notwithstanding the figure contained in the respondent's submissions of Shs.54,610/=. The pleadings and the evidence adduced overrides the submissions of the counsel who seems to have overlooked the fact that the court would award the Shs.25,000/= in the absence of receipts.

The respondent produced documentary evidence which included letter of appointment and job confirmation and salary review. These documents were sufficient evidence of the deceased earnings of Shs.39,680/= as an employee of Express (K) Ltd. The respondent testified that the deceased established a motor assessor business after quitting gainful employment. The letter of registration of business dated 6/5/2004 was tendered in evidence. The evidence of the respondent was that the deceased carried on business in a building along Jogoo road but she did not know the name of the building. This does not mean that she did not know the deceased's place of work. This court takes judicial notice that a person may visit an office in a place in Nairobi City several times without noting the name of the building if it is not posted at all or is not displayed in a conspicuous place. The deceased paid school fees for his children pursuing university education amounting to over Kshs.350,000/= as per the receipts and college reports produced by the respondent. Evidence of expenses is a good reflection of a person's income unless the contrary is proved. I rely on the case of **JACOB AYIGA MARUJA & ANOTHER VS SIMEON OBAYO [2005] eKLR** where the Court of Appeal held:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail”.

There is sufficient evidence that the deceased paid school fees for his children and provided other support for his family to the tune of over Kshs.350,000/=. He cannot be said to be a man of mean resources and the court would be out of touch with reality of lives of Kenyans to hold the view that there was no proof of income and proceed to use a multiplicand based on minimum wage under the Employment Act. Such a multiplicand would be applicable in a case where there is no evidence of any expenses of the deceased during his lifetime or where the deceased was a mere casual labourer.

The appellant argument that the deceased had committed an offence by failing to pay tax to Kenya Revenue Authority is not supported by any evidence. The Respondent's evidence was that she did not come across the records of returns of the deceased. The respondent was not working in the said office and would not be expected to know the whereabouts of the said records. Failure to trace them does not mean that the deceased was not paying income tax.

The appellant relied on the case of **ALLAN NJUGUNA VS VERONICAH NYAMBURA & 2 OTHERS Court of Appeal Civil Appeal No. 165 of 1993**. In that case, the accountant of the deceased gave evidence and admitted that he assisted the deceased to falsify tax returns to Kenya Revenue Authority. The facts in this case are different and not comparable with the **Allan Njuguna Case**. I therefore disregard that line of argument.

The trial court use of the multiplicand of Shs.60,000/= was based on the evidence of the deceased's expenses which were given in quarterly periods. The trial court ought to have taken into consideration that the deceased was obligated to pay tax to the tune of 30% of his income amounting to Shs.18,000/= and reduce the income by that percentage as follows:-

$60,000 \text{ less } 30\% (18,000/=) = 42,000/=$

The use of multiplicand of Shs.60,000 was wrong in that it disregarded payment of income tax and considered that the full income of the deceased as the basis of the multiplicand.

I find it appropriate to use a multiplicand of Kshs.42,000/= with the multiplier of eight (8) years and the ratio of two thirds which were not subject to this appeal. For loss of dependency therefore this court computes the award as follows:-

$42,000 \times 4(\text{quarterly income}) \times 8 \times 2/3 = 896,000/=$

The awards under the Law Reform Act were not contested. Therefore, the figures of loss of expectation of life of Shs.100,000 and that of pain and suffering of Sh.10,000/= remain undisturbed. The total award including special damages of Shs.69,610/= amounts to a grand total of 965,610/=.

it is trite law that where a court has awarded damages under the Fatal Accidents Act and also under the Law Reform Act, the damages under Law Reform Act must be deducted from the entire award to avoid double benefit. This applies in every case where the dependants benefiting under the Fatal Accidents Act are the same as those compensated under the Law Reform Act.

Therefore, the trial magistrate ought to have deducted Kshs.100,000/= from the entire award. The entire award of Shs.965,610 less 100,000 amounts to Shs.865,610/= less 40% (346,244) contribution equals to Shs.519,366/= payable to the respondent with interests at court rates.

It is important to note that the computation of the trial court for loss of dependency was wrong. Even if the magistrate used the multiplicand of 60,000/= the total award would have amounted to Kshs.1,280,000/= and not 3,840,000/= as indicated in the judgment ($60,000 \times 4 \times 8 \times 2/3 = 1,280,000/=$). It appears that the magistrate did not consider that the deceased's income was quarterly and not monthly. The damages were therefore exaggerated by error in the calculation.

The appeal is partly successful as the awards have been re-assessed. Due to the unique circumstances of this appeal which include inadvertent errors made by the trial court, I hereby order that the parties meet their own costs herein while the appellants will bear the costs of the court below.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 10TH DAY OF DECEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kathungu for Ndumu Kimani for the Respondent.

F. MUCHEMI

JUDGE