



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 42 of 2010

SAMWEL OSEWE OCHILLO APPELLANT

-VERSUS-

SIMION OMWOYO OBARE (Suing as legal representative of the estate of

MARY NYASUGUTA SIMION – Deceased RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's court,

Kisii in Civil Suit No. 446 of 2008 dated 16th February, 2010)

JUDGMENT

1. The appellant in this appeal was the defendant in Kisii Chief Magistrate's Civil Case No. 446 of 2008. He had been sued in connection with the death of the deceased, **Mary Nyasuguta Simion**, which occurred as a result of a road traffic accident which occurred on or about 3rd October, 2007 along the Kisii-Keroka road at Kegati between motor vehicles registration number KAL 521Z Isuzu tipper owned by the appellant herein and motor vehicle registration number KAY 058Y in which the deceased was travelling as a fare-paying passenger.

2. At the time of her death, the deceased was 50 years old and was

a vegetable and maize hawker at Keumbu market. It was averred that the business brought her about Kshs. 5,000/= per month 2/3 of which she spent on maintaining her large family of 11. It was also averred that at the time of her death, the deceased enjoyed good health and abstained from alcohol and tobacco and was likely to live beyond the age of 70 years. It was contended that by reason of her death the deceased suffered pain before death and her estate had also suffered loss due to her death at the prime age of 50 years.

3. By consent of the parties recorded in court on 30th November, 2009 liability was apportioned at 85%:15% in favour of the respondent. Judgment on quantum was entered as follows:-

(a) Loss of dependency	Kshs. 5,000 x 12 x 15 x 2/3 x 85%
= Kshs. 510,000/=	
(b) Loss of expectation of life	Kshs. 100,000 x 85%
= 85,000	
(c) Pain and suffering	Kshs. 10,000 x 85%
= Kshs. 8,500/=	
(d) Special damages	Kshs. 16,200/=

Total

Kshs. 619,700/=

plus costs of the suit and interest thereon.

4. The appellant was aggrieved by the said assessment and through the memorandum of appeal dated 10th March 2010 and filed in court on 15th March 2010, he raises the following grounds of appeal:-

1. *The learned trial magistrate grossly misdirected himself in treating the evidence and submission on liability before him superficially and consequently coming to a wrong conclusion on the same.*

2. *The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.*

3. *The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.*

4. *The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent.*

5. *The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's injuries and consequences arising therefrom.*

6. The appellant therefore prays that the appeal be allowed with costs and that judgment of the learned trial magistrate be set aside with costs. The parties agreed to proceed with this appeal by way of written submissions. The appellant's submissions duly filed on 14th May 2012 (but undated) are to the effect that the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability and hence coming to a wrong conclusion on the same. Counsel also contends that the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent and consequently made an award that was inordinately too high in the circumstances, especially considering the respondent's injuries and consequences arising therefrom.

7. The appellant's contentions are anchored in the following:-

a. *That there was no documentary evidence to confirm that the deceased earned Kshs. 5,000/= from her business of selling vegetables and maize; that therefore the learned trial magistrate should have adopted the lower figure of Kshs. 3,000/= per month.*

b. *That the deceased was a married woman with a husband who provided for the family and that it was thus erroneous for the trial court to conclude that the deceased provided for almost all the family needs; that the learned trial magistrate should have adopted a multiplier of 1/3 since no proof of dependency was proved.*

c. *That the trial court should have considered the vicissitudes of life which, considering the retirement age of the deceased which was put at 65. That a multiplicand of 5 years would have been sufficient in the circumstances; though it is contended that deceased, who died at age of 50 could have continued with her farm activities until she was aged 60.*

d. *That the amount awarded for loss of expectation of life under the Law Reform Act ought to have been subtracted from the total amount awarded to the respondent.*

8. In a nutshell, the appellant prays that the quantum of damages payable to the respondent be adjusted downwards as follows:-

- Loss of dependency $3,000 \times 5 \times \frac{1}{3} \times 12$

Kshs. 60,000.00

-	<i>Pain and suffering</i>	Kshs. 5,000.00
-	<i>Loss of expectation of life</i>	Kshs. 7,000.00
	Grand total	Kshs. 135,000.00
-	<i>Less 15% contribution</i>	Kshs. 20,250.00
	Total	Kshs. 114,750.00
	<i>Add specials</i>	<u>Kshs. 16,200.00</u>
		<u>Kshs. 130,959.00</u>

9. Reliance was placed on a number of authorities the first of which was **Muiruri Karanja & Another –vs- Jirdah Mwangi Kamau Mweru – Nairobi HCCC No. 4016** of 1995 in which the deceased was 5 years old at the time of his death. A multiplier of 5 years was used. In the case of **Agnes Wangu Muriuki –vs- Robert Maina Mugo – Nairobi HCCC No. 1125 of 2000**, the deceased was 50 years old at the time of his death. A multiplier of 5 years was adopted. Finally, in the case of **Floice Adema Onami –vs- Kezia Muthoni Ngure & Others – Mombasa HCCC No. 301 of 2001** the deceased died at age 50 and a multiplier of 5 years was used. In this case, it was rightly stated that the claim under the **Law Reform Act** was to be taken into account when considering the claim for and under the **Fatal Accidents Act**.

10. As is required of a first appellate court, I have reconsidered and evaluated the evidence afresh, only bearing in mind the fact that I have had no opportunity of seeing and hearing the witnesses who testified before the trial court. See generally **Peters –vs- Sunday Post Ltd (1958) E. A 424 and Selles & Another –vs- Associated Motor Boat Co. Ltd & Others [1970] E. A 123**.

11. From an analysis of the above, two issues need determination. The number of years to be applied in calculating the deceased's retirement age, knowing that she was said to be 50 years of age at the time of her death. Secondly the amount of money per month which the deceased could be said to have been making from her business. The trial court applied 15 years and Kshs. 5,000/= while the appellant suggests 5 years and Kshs. 3,000/=.

12. The principles to be applied by an appellate in determining whether or not to disturb the quantum of damages awarded by a trial court were enunciated in two cases cited to me by counsel for the appellant. In **Kisii HCCA No. 43 of 2010** (decided by myself on 11th April, 2012) namely **Samwel Osewe Ochillo –vs- Simion Fred Nyaema** in which reliance was placed on the cases of **Henry Ilanga –vs- Manyema Manyoka (1961) E. A 705, 709 and 713** and the case of **Lukenya Ranching & Farming Co-operative Society Ltd –vs- Kavoloto (1970) E. A 414, 418 and 419**. The principles are:-

“...that it must be satisfied that either that the judge/magistrate

in assessing the damages took into account an irrelevant fact or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage....”

13. It was submitted in the instant case that the trial court used the wrong figures and other relevant factors such as that there was no documentary evidence of the actual monthly earnings of the deceased and the fact that the deceased was a married woman with a husband who provided for 90% of the family's needs. It was also contended that the trial court did not take into account the vicissitudes of life in reaching the conclusion that the deceased would have worked until age 65 years.

14. I have now carefully considered the submissions made, the evidence tendered and the principles to be applied by this court in deciding the issue of whether or not to interfere with the quantum of damages herein.

15. I shall begin with the multiplier of 15 years. The appellant admits that the deceased could have worked up to age 60 but proposes a multiplier of 5 years. The court takes judicial notice of the fact that the retirement age for public servants in this country has since been enhanced to 60 years, and this means that those in the private sector are likely to work for even longer upto about 65 years as noted by the trial court. In the circumstances of this case, I think that the trial court properly exercised its discretion in adopting 15 years as multiplier in this case.

16. As to the multiplicand of Kshs. 5,000/= adopted by the trial court, I do not think that I have any reason to doubt the proper exercise of discretion of the trial court in adopting the same. People in the informal sector do work hard and I am persuaded that it was not unreasonable for the trial court to believe that the deceased's income was Kshs.5000/= per month. I am also of the humble view that despite the fact that the deceased was a married woman with a husband, it was not farfetched for the trial court to reach the conclusion that the deceased spent $\frac{2}{3}$ of her income on her family.

17. I have carefully gone through the plaintiff's testimony who told the court that he was a peasant and had 8 children. He testified that the deceased used to farm in addition to trading in vegetables and maize, and that she assisted him in paying school fees for the children. I do not find any statement by the plaintiff to the effect that he was providing 90% of the family's needs during the life of the deceased. The appellant's contention in that regard is thus not supported by evidence. In the circumstances, I find no fault with the trial court's adoption of $\frac{2}{3}$ dependency ratio.

18. The upshot of what I have said above is that this appeal lacks merit and the same is accordingly dismissed with costs to the respondent.

19. It is so ordered.

Judgment dated, signed and delivered at Kisii this 31st day of January, 2013.

RUTH N. SITATI
JUDGE

In the presence of:

Mr. Ombachi for Ogari (present) for appellant

M/s L.G. Menezes (Brief held by Mr. Abisai) for respondent

Mr. Bibu - Court Clerk

RUTH N. SITATI
JUDGE