



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO 53A OF 2009

**DIONESIO NJERU MUNYIRI (Suing as legal representative/Administrator of the estate of the late
PAUL MUGENDI NJERU – Deceased)**
.....APPELLANT

VERSUS

TIMOTHY MARANGU MARETE1ST
RESPONDENT

CHAIRMAN BOARD OF GOVERNORS KANYAKINE HIGH SCHOOL2ND
RESPONDENT

*(Being an appeal from the judgment of the Hon. Kathoka Ngomo – SPM in Embu Chief Magistrate’s
Court CMCC NO. 118 OF 2008 delivered on 10th March 2009)*

J U D G M E N T

On 14th June 2006 the deceased Paul Mugendi Njeru, aged 31 years, was cycling along Embu - Meru road at Nithi bridge when he was hit dead by an Isuzu bus registration number KAR 432L belonging to the 2nd Respondent and which being driven by the 1st Respondent. The deceased was the son of the Appellant. The Appellant took out letters of administration and filed a suit against the Respondents for general and special damages. The suit was filed under both the Law Reform Act Cap. 26 and the Fatal Accidents Act Cap. 32. In a judgment delivered on 10th March 2009 by the learned Senior Principal Magistrate, the issue of liability was determined by apportioning it at 80:20% in favour of the Appellant. On quantum, the court made an award as follows:-

1. loss of expectation of life - kshs.50,000/= ;
2. lost years - Kshs.20,000/=;
3. fatal Accidents Act - Kshs.20,000/=;
4. special damages - Nil; and
5. costs of the suit and interest at court rates.

The Appellant was aggrieved by the decision on quantum and filed this appeal whose grounds were that:

- a) the awards were evidently too low and unrealistic and not in line and/or in conformity with the prevailing awards for similar claims;
- b) the court considered extraneous evidence and in particular the doctors' reports on injuries suffered when they were no such reports;
- c) the awards were made without any reasons or justification;
- d) the court did not consider the written submissions filed and the authorities cited; and
- e) there was nil award on special damages when evidence by way of receipts had been produced to prove the pleaded amounts.

The parties agreed to have the appeal determined on written submissions. The respective counsels filed the submissions and relied on authorities. In the submissions by the Respondents' counsel it appears they were challenging the finding on liability against their clients. There was, however, no cross appeal by the Respondents. The appeal was by the Appellant and on quantum only. The issue of liability cannot be revisited.

On quantum, it was submitted on behalf of the Respondents that the trial court had considered the evidence, written submissions and authorities in reaching the decision.

It is now settled that an appellate court will not interfere with the decision of the lower court in regard to the assessment of damages unless it can be shown that the court took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately high or low that it must be a wholly erroneous estimate of the damages (***KENFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES AND GATHOGO KANINI –V- LUBIA AND OLIVE LUBIA [1982 – 88] KAR 728*** and ***ROBERT MUSIOKI KITAVI –V- COASTAL BOTTLERS LIMITED [1982 -88] KAR 891***).

The trial court remarked as follows before making the contentious award:

“On the issue of quantum of damages I have gone through the counsels submissions. I have read the authorities provided and I have read the doctors reports on the injuries suffered. After taking everything into consideration, I award damages as follows:”

The court was dealing with a case in which the deceased was crushed dead at the scene. It was not a case of injuries suffered in the accident. No medical reports were produced during the trial. By making reference to injuries and to medical reports, the trial court was certainly not dealing with the evidence before it.

It is also apparent that the court did not at all consider the written submissions and authorities that were placed before it. This is because the submissions and authorities were in relation to the fatal accident and the damages payable on each head. The submissions made no reference to medical report or injuries suffered in the accident. There is therefore basis to interfere with the award in this case as there was disregard of the evidence and regard of non-existent evidence. For instance, the Appellant had sued for special damages. During evidence he produced receipts to show the expenses incurred and yet the trial court returned a nil verdict without any reason or explanation. In short, it falls on this court to review and reevaluate the evidence as recorded to be able to reach its own conclusion regarding the amounts payable following the death of the deceased.

Under the Law Reform Act, it is clear that the deceased died immediately following the crush. He must have suffered a certain degree of pain following the violent accident before he met his death. For

pain and suffering I award kshs.10,000/=. For loss of expectation of life, the Appellant had sought kshs.100,000/= on the basis of the decision in **ELIJAH MOKANO MIRORO –V- NELSON BICHANGA AND ANOTHER HCCC NO. 172 OF 1999 AT KISII**. The Respondents offered kshs.70,000/= on basis of **MARGARET WANGUI KIOKO –V- MUUS KENYA LTD HCCC NO. 2005 OF 1999 AT NAIROBI** and **LUCY M. NJERI –V- FREDRICK MBUTHIA & ANOTHER HCCC NO. 1484 OF 1993 AT NAIROBI**. In the circumstances of this case, I award a conventional figure of kshs.100,000/=.

Under the Fatal Accidents Act, the Appellant sought kshs.448,000/=. This was on the basis that the deceased was aged 31 years and was doing the business of buying and selling macadamia nuts and earning a monthly sum of kshs.7,000/=. Counsel asked the court to allow for kshs.5,600/= a month which was equivalent to the Government’s minimum monthly wage. It was submitted that although the deceased was unmarried he was supporting the Appellant and his wife (the deceased’s mother). It was sought that a multiplier of 20 be given with a dependency ratio of 1/3. $Kshs.5,600/= \times 12 \times 20 \times \frac{1}{3}$ makes kshs.448,000/=. It was the Respondents case that there was no documentary proof of income on the part of the deceased.

It was clear that the deceased was 31 years old and unmarried. He was staying with the Appellant. The Appellant testified that the deceased was buying and selling macadamia and earning between kshs.7,000/= and 8,000/= every month and that he used the money to assist his parents. The Appellant stated as follows;

“We are aged and can’t work.”

The Appellant may not have had documents, but the testimony that the deceased was buying and selling macadamia nuts and earning an income from which they benefitted was not challenged. That evidence is acceptable and it is found that the Appellant and his wife depended on the deceased. I find that the deceased’s monthly income was kshs.7,000/=. The Appellant’s proposed multiplier of 20 was not challenged. I consider that the usual retirement age is 55 years. The deceased was using part of his income on himself. The dependency ratio of $\frac{1}{3}$ is reasonable. The amount payable shall be $kshs.7,000/= \times 12 \times 20 \times \frac{1}{3} = kshs.560,000/=$. Since, however, the Appellant asked for kshs.448,000/= that is the amount that is awarded.

In regard to special damages, the Appellant sought kshs.33,890/= as follows:-

- a) coffin - kshs.5,000/=
- b) transport – kshs.10,000/=
- c) police abstract – kshs.200/=
- d) application for limited grant – kshs.10,000/=
- e) mortuary and embalmment – kshs.8,000/=
- f) post-mortem – kshs.500/=
- g) death certificate – kshs.190/=

In the trial he produced receipts for kshs.5,000/= (exhibit 3) for coffin, kshs.10,000/= (exhibit 4) for hire of vehicles, kshs.500/= and kshs.8,000/= (exhibit 5) for mortuary expenses and embalmment of the body of the deceased and kshs.10,000/= (exhibit 7) for filing a case in the High Court for limited grant. The total is kshs.33,500/= which is hereby awarded.

The result is that there shall be an award as follows:

- a) Pain and suffering – kshs. 10,000/=
- b) Loss of expectation of life – kshs.100,000/=
- c) Loss of dependency – kshs.448,000/=
- d) Special damages – kshs. 33,500/=
- TOTAL kshs.591,500 /=
- Less contribution of 20% - kshs.473,200/=

Costs and interests shall follow the event. The Respondents shall also pay the costs of the appeal.

DATED SIGNED AND DELIVERED AT EMBU THIS 20TH DAY OF SEPTEMBER 2011

A.O. MUCHELULE

JUDGE