



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 19 of 2004

BARNABAS BWAMBOK 1ST
APPELLANT

AVENTIS PASTEUR 2ND
APPELLANT

VERSUS

**VITALIS ODIWOUR RUGIE AND EUNICE CLEVER (Suing as the administrators of the estate
of**

**ELIZABETH ANYANGO RUGIE)
RESPONDENTS**

**(Being an appeal from the judgment and decree of Honorable W. N. Njage, Principal Magistrate
delivered on 19th January 2004 in ELDORET CMCC No. 800 of 2002)**

JUDGMENT

This appeal has been triggered by the Judgment of the Principal Magistrate at Eldoret who entered judgment against Barnabas Bwambok and Aventis Pasteur jointly and severally, in the sum of K.Shs.448,500/- together with costs and interest, in an accident claim by Vitalis Odiwuor Rugie and Eunice Clever, who had sued as the Administrators of the estate of Elizabeth Anyango Rugie.

Bwambok and Aventis Pasteur hereinafter called “the 1st and 2nd appellant” respectively who feel aggrieved by the said judgment, have preferred this appeal, which is based on the grounds that the learned Magistrate erred in law and in fact in:

- “1. *making an award in general damages in favour of the Respondents that was too excessive in the circumstances.*
2. *awarding damages for pain and suffering when the same had not been pleaded nor evidence tendered in that behalf.*
3. *awarding damages for funeral expenses in view of the fact that the same were special damages which were not specifically proved as no evidence was tendered in that behalf.*
4. *awarding damages for loss of dependency by adopting a multiplier of 30 that was far much higher than what had been pleaded by both parties.*

5. *holding that the deceased's income was Kshs.5, 000/- when no evidence had been tendered in that behalf and which holding was contrary to settled law and practice.*

6. *failing to take into account the Appellants' submissions and authorities cited before him in arriving in his judgment."*

Rugie and Clever who I shall now refer to as "the respondents" have filed a cross-appeal which is based on the grounds that the trial magistrate erred in law and in fact in inter alia:

"1. awarding the respondents a sum that was too low for pain and suffering in total disregard to the requirements of conventional justice and the authority cited to him by the respondents' advocates.

2. making an award for the respondents while pegging the deceased's income at Kshs.5,000/- instead of Kshs.10,000/- a sum that was pleaded and proved by the respondents.

3. making an award that was too low in favour of the respondents in disregard to the appreciation of the pleadings, evidence on record and the law."

In an appeal of this nature, it is trite that the appellate court will not usually interfere with the award unless it is established that the learned trial Magistrate misdirected himself or that he based his findings on the wrong principles of law.

I have as is expected of me reevaluated the evidence on record with a view to establishing whether this appeal and the cross appeal are indeed meritorious.

Briefly, on 28/4/2001, Elizabeth Anyango Rugie ("the deceased") who was a trainee cateress at the White Castle Hotel in Eldoret was knocked down by a vehicle on the Eldoret - Kapsabet Road, which vehicle was then owned by the 2nd appellant, and which was being driven by the 1st appellant at the material time. The parties recorded a consent order on liability and at 65% in the plaintiffs favour, and the issues that arise in this appeal and the cross appeal are purely on quantum.

PW1 had testified that she learnt of the accident at 9 a.m. or 10 a.m. that morning, after she was called and informed that her sister had been rushed to the hospital, but that PW1 found her already dead when she arrived at the hospital. Given these set of circumstances, it was evident that the death was not instantaneous, and in which case the award of damages for pain and suffering was well merited. I find that an award of Shs.50,000/00 was fair and would have no reason to interfere with it.

It is trite that special damage should not only be specifically pleaded, but they should be specially proved. The respondents' prayed for special damages of K.Shs.30,000/- for funeral expenses and K.Shs.200/- for both the Death Certificate and Police Abstract. No receipts were produced to support the claim for burial expenses, and the appellants now urge this court to set aside the trial Magistrate's award of K.Shs. 20,000/- which he awarded as a reasonable award for funeral expenses, having noted that the receipts were not availed. I am inclined to leave that award intact as the issue of the funeral was not in dispute. It is a well known fact that expenses are incurred during funerals and in my view, an award of K.Shs. 20,000/- was reasonable in the circumstances. Be that as it may, there was sufficient evidence to show that the deceased assisted her siblings financially and that she also contributed towards payment of school fees for her two younger brothers. She also supported her 5year old daughter, who was also of school going age.

PW2, produced vouchers to show that the deceased used to earn a monthly salary of Shs. 10,000/-. The appellants dispute the figure, which they claim should have been net of tax. In my humble opinion, he based his decision on the right of 1/3 as the balance of 2/3 would cater for the personal needs of the deceased as well as statutory deductions, which include tax.

It is on record that the trial Magistrate based his computation on a salary of Shs.5000/00, which in my mind was erroneous for there was sufficient evidence to show that she drew Shs.10,000/00 pre month and

on which basis he should have taken that as the base figure. I would have no basis to interfere with the multiplicand of 30 years, it would be reasonable to expect a young lady to have a career spanning over 55 years, which would have left her with an active 30 years. I find that his reasoning was acceptable. I do set aside that particular award and instead award the respondents the sum of Shs.780,000/00 being 65% of Shs. 1,200,000/00, which I base on the following formula:

$$\text{Shs.}10,000/00 \times 1/3 \times 30 \times 12 = 1,200,000/00 \times 65\% = \text{Shs. } 780,000/00.$$

Otherwise, I find that the trial Magistrate was not misguided, and that he applied the right principles of law in arriving at his decision.

The upshot of all this is that the appeal which lacks in merit is dismissed and cross-appeal is allowed to the above extent.

The appellants shall bear the costs of this appeal. Dated and delivered at Eldoret this 11th day of April 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kutwa for the respondent

Mr. Shivaji for the applicant