



REPUBLIC OF KENYA



Donnie & another v Alusa (Suing as Legal Representative of the Estate of Pamela Vomoji Ishunga - Deceased) (Civil Appeal E010 of 2020) [2024] KEHC 7589 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E010 OF 2020
SC CHIRCHIR, J
JUNE 20, 2024**

BETWEEN

ESHITEMI SHIKUKU DONNIE 1ST APPELLANT

NAHASHON TINDI MUSOTSI 2ND APPELLANT

AND

WILFRED ALUSA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PAMELA VOMOJI ISHUNGA - DECEASED) RESPONDENT

(Being an appeal from the Judgment of Hon. Hazel Wandere in Kakamega CMCC No.226 of 2017 delivered on 23rd September 2020.)

JUDGMENT

1. The Respondent herein filed suit against the Appellants at the chief Magistrate's court at Kakamega seeking for general and special damages under the *fatal Accidents* and *Law reform Act*.
2. The claim was brought on behalf of the Estate, and dependants of Pamela Vomoji Ishuga (Deceased), who died as a result of injuries sustained following a road accident which occurred on 31.5.2016 along Kakamega- Mumias road. The accident involved motor vehicle registration No. KBH 502L and the deceased who was a pedestrian on the said road.
3. In a judgment delivered on 23rd September 2020, the trial court apportioned liability in the ratio of 70% as against the Appellants and 30% against the deceased.
4. On damages the court awarded Kshs. 100,000 for loss of expectation of life, Kshs.10,000 on account of pain and suffering and Kshs. 960,000 for loss of dependency.



5. Aggrieved by the judgment, the Appellants filed the present Appeal, and have set out the following grounds:
1. That the Honourable Magistrate erred in law in awarding damages that were too high in the circumstances of the matter.
 2. That the Honourable Magistrate erred in law in failing to appreciate the principles applicable in the award of damages under the Loss of expectation of life thereby arriving at an inordinately high award to the respondent without any justification or basis of the same.
 3. That the Honourable Magistrate erred in law in applying an inordinately high multiplier in awarding damages to the Respondent without any justification or basis of the same.
 4. That the honourable Magistrate erred in law in failing to appreciate the principles applicable in applying the multiplicand in the award of damages by applying an inordinately high Multiplicand to the Respondent under the head of loss of dependency.
 5. That the learned Magistrate erred in law and in fact applying an inordinately high dependency ratio of 2/3 instead of 1/3 without any proof and/or evidence or even justification.
 6. That the honourable Magistrate erred in law in relying heavily on the Respondent's submission and ignoring the Appellant's submissions.
 7. That the Honourable Magistrate erred in fact in failing to take into account the authorities cited on behalf of the appellant's with regard to the damages awarded to the Respondent under loss of dependency, pain and suffering and loss of expectation of life.
6. The appeal was canvassed by way of written submissions.

Appellants' submissions

7. The appellants submit that there was no proof of the deceased's occupation or earnings and therefore the court should have applied the prevailing minimum wage earned by general labourers in the year 2015, being the year of the deceased's demise. In this regard he has relied on the case of *Mombasa Maize Millers Limited vs. WIM suing as the representative of J A M (deceased)* 2016 where the court held that in the absence of proof of income, the trial court ought to rely on the Regulation of wages (General Amendment) order 2005.
8. It is submitted that the minimum wage of the general labourers at the time of the deceased's demise was ksh. 5,844 as per Legal Notice Number 116 of 2015, and the court ought to have applied the wage as per the said Notice.
9. The Appellants further submit that the Trial court adopted an income of ksh. 6000 without any basis. They have relied on the case of *Siyaram Enterprise & another vs. Samuel Nyanchani Nyachani* (2015) e KLR where the court applied minimum wage in the absence of proof of income.
10. On the multiplier, the Appellants submit that the deceased was aged 44 years and taking into consideration the imponderables of life, the court ought to have applied a multiplier of 15, and not 20



years. Reliance was placed in the case of *Dhara Wholesale Ltd vs. Teresia Kaimenyi & another* (2009) eKLR in which the court applied a multiplier of 11 years, where the deceased died at the age of 44 years and the case of *RKO & another vs. Kenya Power & Lighting Company Ltd* (2015) where the deceased died aged 40 years and the court used a multiplier of 12 years.

Respondent submissions

11. The respondent submits the trial court largely relied on the Appellants submissions and their allegations that their submissions were ignored is not true.

Analysis and determination

12. This is a first Appeal and the duty of this court has been restated in many past decisions of the superior courts. In *Gitobu Imanyara vs Attorney General* (2016) e KLR the court of Appeal held: “An Appeal to this court from a trial by the high court is by way of retrial and the principles upon which the courts act on such Appeal are well settled. Briefly they are that, this court must consider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”
13. Although the Appellants filed several grounds of Appeal, they have only prosecuted one issue, that is, the award on loss of dependency and specifically the multiplier and the multiplicand applied by the trial court. Consequently I will confine my decision to these two items
14. Assessment of damages is an act of discretion and the principles upon which an Appellate court may interfere with the discretion of the trial court are well settled. In *Robert Nsioki Kitavi v Coastal Bottlers Ltd* [1982] – 198 IKAR 891 – 895 the court stated as follows; “The appellate court will only interfere with a trial Judge’s assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate.”

Multiplier

15. It is the Appellant’s case that the multiplier of 20 years was too high; that the court ought to taken into account the vagaries of life; and that an appropriate multiplier would have been 15 years. They have relied on the case of *Dhara wholesalers (supra)* and *RKO VS KPLC* (Supra)
16. On the deceased’s age, PW1 told the court that the deceased was 40 years of age, but the Death certificate he produced (PExb 2) showed that the deceased was 44 years. The trial court went by the death certificate and placed the deceased age at 44 years. The trial court further accepted the testimony of PW1 who told the court that the deceased was a farmer and a nursery school teacher. The witness had no documentary proof to back up his testimony in this regard. The trial magistrate in her judgment accepted the oral evidence of PW1 to the effect that the deceased was a nursery school teacher and a farmer. The magistrate is the one who observed the demeanour of the witness, and I have no reason to depart from her findings in this regard.
17. The trial court then went on to state that the deceased would have worked past the age of 60 years. The retirement age in this country is 60 years, and therefore going strictly by consideration of the retirement age the, multiplier should have been 16 years.
18. However, the Deceased was also a farmer as founded by the trial court, and as such she need not have retired at the age 60 years. It is a fact of common notoriety that people running their business or doing farming like in this case can work up to 70 or 80 years of age. Thus whereas as a teacher she was expected to retire at 60, she could go on with her farming activities as aforesaid.



19. The Appellant has argued that the trial court should have factored in the vagaries of life. It is true that vagaries of life is a factor in determine a multiplier . However the retirement age is a factor too. And the courts are at liberty to apply any or both of the factors depending on the circumstances of each case. Therefore, the trial court cannot be faulted for opting to use one factor, as opposed to the other.
20. In any case, this court must bear in mind that it is only where the award, and hence the factors that go into its determination, is too low or too high, that the appellate intervenes. I don't consider the multiplier of 20 years against the deceased age of 44 years to be too high as to warrant any intervention by this court.

Multiplicand

21. The Appellants have argued that the income of ksh. 6000 per month had no basis, as the minimum wage at the time was ks. 5,844. The relevant legal Notice at the time of the deceased's death in may 2016 was Legal Notice No. 117 of 2015 and not 116, cited by the Appellant. Nevertheless, I agree that the minimum wage then was ksh. 5,844 for areas outside the former municipalities .The correct income the trial court ought to have applied therefore was ksh. 5,844 and not ksh.6,000. To this extend the lower court erred. I will therefore set aside the income of ksh. 6,000 and substitute it with ksh. 5,844.
22. The dependency ratio has not been challenged.
23. The damages on loss of dependency will therefore work out as follows:- ksh. 5,844 x 12 x20x 2/3= ksh. 935,040.
24. In the end I enter judgment as follows:
 - a). This Appeal partially succeeds.
 - b). The award on loss of dependency by the Trial court is hereby set aside and substituted with ksh. 935,040
 - c). The total award will work out as follows:
 - (i) Loss of expectation of life- ksh. 100,000
 - (ii). Pain and suffering- ksh. 10,000
 - (iii). Loss of dependency- Ksh. 935, 040
 - Total.....Ksh.1,045,040
 - d). The total award will be subjected to the apportionment of 70%/ 30%.
 - e). The award will attract interest at court rates from the date of judgment at the trial court
 - f). Each party will meet their own costs in this Appeal
 - g). For avoidance of doubt, the respondent gets the costs of the suit in lower court suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH OF JUNE 2024.

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin – Court Assistant



Ms Koskei for the Appellant.

