Warui v Thimbui (Suing as Legal Representatives of the Estate of Rahab Wanjiru Ngari (Deceased)) (Civil Appeal E004 of 2022) [2024] KEHC 16859 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16859 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E004 OF 2022

AK NDUNG'U, J

NOVEMBER 20, 2024

BETWEEN

SUSAN WANGECHI WARUI ..... APPELLANT

AND

BERNARD NGARI THIMBUI ..... RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF RAHAB WANJIRU NGARI (DECEASED)

(Appeal from original Decree passed on 06/04/2022 in Nanyuki CM Civil Case No 82 of 2020 – A.R Kithinji, CM)

JUDGMENT

1. This is an appeal in respect to quantum of damages awarded in the judgment of the lower court passed on 06/04/2022 The parties herein having consented on liability in the ratio of 85:15 in favour of the Respondent. The trial court awarded the Respondent damages in the following terms;

    Pain and suffering- Kshs.50,000/-

    Loss of expectation of life Kshs.100,000/-

    Loss of dependency- Kshs.5,580,000/-

    Special damages- Kshs.88,850/-

    Total- Kshs.5,668,850/-

    Total less 15% contribution- KShs.4,818,522/-

2. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated 25/04/2022 and raised the following grounds;

   i. That the learned magistrate erred by adopting a multiplicand of Kshs.30,000/- without any sufficient basis thereby arrived at an award for loss of dependency that was inordinately excessive thus a wholly erroneous estimate of the damages payable.

   ii. The learned magistrate erred by adopting a dependency ratio of ½ which was not proved thereby arriving at award that was inordinately excessive.

   iii. The learned magistrate erred by failing to subject the awards for pain and suffering and loss of expectation of life to the agreed apportionment of liability without giving reasons of departing from the consent.

   iv. That the judgment of the learned magistrate is against the law and weight of evidence on record.

3. The appeal was canvassed by way of written submissions.

4. The Appellant submitted thatthe Respondent pleaded that the deceased had two dependants who were her parent. PW1 testified that he was a farmer which was prove enough that he did not wholly depend on the deceased. That the Respondent produced an account statement in a bid to show the deceased's earnings but failed to explain numerous transactions and source of cash deposited. Further that account statement is not proof of employment or evidence that deceased carried on any business. Therefore, deceased's earning was unascertainable and he urged the court to abandon the multiplier approach and adopt a global sum of Kshs.1,000,000/- as sufficient award for loss of dependency as the deceased died aged 24 years. Reliance was placed on the case of Teresiah Wanjiru Githinji vs Lucy Kanana M'rukaria& another (suing as legal representative of Ernest Gutuura Nabea (deceased) [2021] eKLR and Elvina Nyevu Garama & another v Samson Kahindi Kitsao & another [2020] eKLR where in both cases a global award was awarded. He prayed that the award on loss of dependency be set aside and allow the appeal as prayed.

5. The Respondent on the other hand submitted that the trial court considered the issue of multiplicand on length and was properly guided by decided cases. The trial court also found that there was proof of earning based on the bank statement that was adduced which showed that the deceased consistently deposited Kshs.30,000/- on monthly basis. That the deceased was gainfully engaged and kept records of her earnings by banking the money and therefore, the bank statement sufficed as a basis on which the court could arrive at the multiplicand. That this was not a proper case to apply the global figure approach since it was possible to deduce the deceased's earnings through the material placed before the court. Further, the deceased was 24 years old and had just graduated with bachelor of education (science).

6. The Appellant's concern is only on the assessment of damagesin respect of loss of dependency. It appears that he abandoned the other grounds he had raised in the memorandum of appeal. His concern is that the trial court adopted a sum of Kshs.30,000/- relying on the bank statement produced as the deceased earning whereas the deceased earnings were unascertainable and what was presented was a mere speculation. They urged the court to adopt the global sum approach.

7. The Respondent on the other hand submitted that the trial court found that there was proof of earning based on the bank statement that was adduced which showed that the deceased consistently deposited Kshs.30,000/- on monthly basis. That the bank statement sufficed as a basis on which the court could arrive at the multiplicand.

8. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of Butt v. Khan Civil Appeal No. 40 of 1997thus: -

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low."

9. It is the law that this court will only interfere with the trial's court award of damages if the Appellants demonstrate that the same was inordinately high or the trial court proceeded on wrong principles.

10. The trial court while awarding damages on for loss of dependency relied on the bank statement from Kenversity Co-operative Savings and Credit Society Limited produced by the Respondent. The trial court found that the deceased was earning at least Kshs.30,000/- every month and proceeded to adopt the said sum as deceased's earnings.

11. I have perused the said bank statement. The amount that was creditedis not consistent. She was not even depositing Kshs.30,000/- adopted by court as sometimes it would be more or less.

12. The question is what was the deceased salary? In Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, the Court of Appeal stated that:

> " The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. ..."(emphasis added)

13. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions.There is no direct evidence of a monthly salary of the deceased. There is however documentary evidence of bankings by the deceased through a bank statement. This is certainly evidence that the deceased was in some form of earnings.

14. In this era of e-commerce, it would be a travesty of justice of monumental proportions to hold onto the notion that evidence of earnings can only be by way of a payslip. Where a party is able to demonstrate consistent banking in their bank account, surely that must be evidence of income generating activity and using the law of averages, the court ought to be in a position to determine, even though without mathematical exactitude, the earnings of such a party.

15. Am fortified in this finding by the holding of the court of appeal in the case of Jacob Ayiga Maraja and Francis Karani v. Simeon Obongo (Suing as the Administrator of the estate of Thomas Denga Obondo C.A. No. 167 of 2002 (Kisumu), where the court stated;

> " In our view, there was more than sufficient material nor record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about KShs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. That kind stand would do a lot of injustice to very many Kenyans

who are even illiterate, keeps no record 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".

16. It is not lost on me that by virtue of her proved professional training, the deceased had a big potential to earn more in the future, and while I would not wish to enter a voyage of speculation as to what those earnings would eventually be, to adopt a global sum award when evidence of banking is available would be inimical to justice and fairness.

17. I have carefully perused the bank statement and am persuaded that the trial court was correct, based on the material before it, to settle for a multiplicand of sh30,000.

18. As regards the dependency ratio, it is a fact that the deceased was not married and her only named dependants in the claim were her parents. Under the *Fatal Accidents Act*, every action brought by virtue of the provisions thereof shall be for the benefit of the spouse, parent and child of the person whose death was caused as a result of a fatal accident.

19. The Kenyan social and economic set up is such that children once raised and into gainful employment or trade support their parents. This assertion finds expression in the law in the Court of Appeal decision in Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

> "In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the *Judicature Act* cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected. ..."

20. The deceased had 2 dependant parents. She was not married. A dependency ratio of ½ is reasonable in the circumstances.

21. With the result that the appeal herein lacks merit. The same is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED THIS 20TH DAY OF NOVEMBER 2024

A.K. NDUNG'U

JUDGE