



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 31 OF 2016

GITAU PERIS alias PERIS GITAU WAMBUI.....APPELLANT

=VRS=

ESTHER NJERI MBUGUA (Suing as the legal representative of the estate of

GERALD NJOROGE NJERI (Deceased).....RESPONDENT

{Being an Appeal against the Judgement of Hon. J. Oseko - SPM Kiambu dated and delivered on the 2nd day of August 2016 in the original Kiambu Chief Magistrate's Court Civil Case No. 226 of 2015}

JUDGEMENT

This appeal was consolidated and was to be heard together with Kiambu HCCA 30 of 2016 **Gitau Peris alias Peris Gitau Wambui v Gerald Njoroche Chege** but because the submissions in respect of this appeal were not on the record at the time the judgement in HCCA 30 of 2016 was written this court was compelled to determine the appeals separately. However, this court made it clear that its findings on the issue of liability in HCCA 30 of 2016 would apply to this appeal. In HCCA 30 of 2016 I found there was no evidence to attribute contributory negligence to the respondents and that the appellant was therefore wholly to blame for the accident. To buttress my finding I shall rely on the case of **Mandua v Kenya Kazi Ltd [1988] KLR 488** where the court stated: -

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in favour of the plaintiff unless the defendant's evidence provides some answer adequate to dispute that inference.”

There was evidence that the victims of this accident were lawfully walking beside the road when the appellant's motor vehicle veered from its side and hit them. The Appellant did not adduce any evidence to controvert that of the Respondent's and hence did not displace the inference of negligence hence my finding that she was wholly to blame.

On the quantum of damages, the principle that guides this court is that it ought not to interfere with the Trial Magistrate's assessment of damages unless it is demonstrated either that the Magistrate acted on a wrong principle of law, or mis-apprehended the facts or that the award is so inordinately high or so inordinately low as to represent a wholly erroneous estimate of the damage (**See Kefro Africa Ltd t/a “Meru Express Services (1976)” & Another Vs. A. M. Lubia & Another (No. 2) [1987] KLR 30**). The damages awarded to the Respondent in this appeal were as follows: -

- (i) Pain & suffering Kshs. 180,000/=
- (ii) Loss of expectation of life. Kshs. 100,000/=
- (iii) Special damages Kshs. 30,000/=
- (iv) Loss of dependency Kshs. 2,688,000/=

The learned trial magistrate did not give any reasons for arriving at the above awards. The judgment states: -

“.....with respect to the deceased I have considered the evidence rendered and the authorities and award the following: -

- Loss & suffering Kshs. 180,000/=

· **Loss of expectation of life Kshs. 100,000/=**

· **Special damages Kshs. 30,000/=**

· **Loss of dependency Kshs. 2,688,000.00**

800 X 28 X 12 X 2/3

Total - Kshs. 2,898,000/=

· **Plus cost and interest from the date of filing suit until payment in full....”**

It is apparent that the trial Magistrate did not take the submissions of counsel for the parties into consideration because if she did then she would have noted that the awards under some of the heads exceeded those proposed by counsel for the respondent. For pain and suffering Counsel for the respondent had proposed Kshs. 50,000/=. It is not clear therefore why a sum of Kshs. 180,000/= was awarded. In regard to the award for loss of dependency there seems to be an arithmetical error because $800 \times 28 \times 12 \times \frac{2}{3} = \text{Kshs. } 179,200/=$ and even were we to assume that what the Learned Trial Magistrate intended to award was $8,000 \times 28 \times 12 \times \frac{2}{3}$ the total would be Kshs. 1,792,000/= but not Kshs. 2,688,000/=. I am therefore persuaded that sufficient reasons exist for this court to disturb the assessment of damages by the Trial Magistrate. Having considered the evidence in the trial court and the other materials placed before me I proceed to assess damages as follows: -

(i) **Pain and suffering - Kshs. 50,000/=** being what was proposed in the lower court by Counsel for the respondent and which I find reasonable given that the deceased did not die instantaneously.

(ii) **Loss of expectation of life - Kshs. 100,000/=** as that is the conventional award under that head.

(iii) **Special damages - Kshs. 30,000/=** as reasonable funeral expenses and as proved by the receipt produced by the respondent at the hearing.

(iv) **Loss of dependency:** The deceased died aged 23 years. Although he was a trader cum farmer his earnings could not be ascertained and proved through evidence so the way to go is to adopt the minimum wage which at the material time was Kshs. 9,024/= as evidenced by the schedule annexed to the submissions of the advocate for the respondent in the court below. The deceased was a farmer and trader so he would not have been compelled to retire at sixty like those in formal employment. In the case of **FMM & Another v Joseph Njuguna Kuria & Another [2016] eKLR** the court adopted a multiplier of 23 years for a 26-year-old. I am persuaded therefore that a multiplier of 28 years is reasonable. As for the ratio where the deceased was unmarried and with no family of his own the practice has been to adopt a dependency ratio of $\frac{1}{3}$ and this case ought to be no different. Damages for loss of dependency shall therefore be assessed as follows: -

Kshs. 9,024 x 28 x 12 x 1/3 = Kshs. 1,010,688/=.

This appeal therefore succeeds to the extent that the assessment of damages by the learned magistrate is set aside and is substituted with one in the following terms: -

(i) **Liability 100%.**

(ii) **Damages:**

(a) **Pain & suffering = Kshs. 50,000/=**

(b) **Damages for loss of expectation of life = Kshs. 100,000/=**

(c) **Special damages = Kshs. 30,000/=**

(d) **Damages for loss of dependency = Kshs. 1,010,688/=**

Total Kshs. 1,190,688/=

(iii) **Costs of the suit in the court below and half the costs of this appeal.**

(iv) **Interest on the damages, those on specials from the date of filing suit and those on general damages from the date of judgement in the lower court.**

It is so ordered.

JUDGEMENT SIGNED AND DATED AT NYAMIRA THIS 24TH DAY OF FEBRUARY 2021.

E. N. MAINA

JUDGE

JUDGEMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY AT KIAMBU VIA MICROSOFT TEAMS THIS 9TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE