



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 149 OF 2017

RAMESH LAIJI RABADIYA T/A MEER SERVICES.....1ST APPELLANT

ONG'ONOH SAMUEL NYAMBEKI T/A MEER SERVICES.....2ND APPELLANT

FELIX MUSAU.....3RD APPELLANT

VERSUS

MARTHA MWIKALI NYAMAI (Suing as the administrators of the estate of the
late STEPHEN KASOMO KIMWELE, Deceased)..... RESPONDENT

An Appeal against the judgment and decree delivered on 7th November, 2017 by Hon. C.A Ocharo Principal Magistrate a Machakos,
in CMCC No. 867 of 2014)

BETWEEN

MARTHA MWIKALI NYAMAI (Suing as the administrators of the estate of the
late STEPHEN KASOMO KIMWELE, Deceased).....PLAINTIFF

VERSUS

RAMESH LAIJI RABADIYA T/A MEER SERVICES.....1st DEFENDANT

ONG'ONOH SAMUEL NYAMBEKI T/A MEER SERVICES.....2nd DEFENDANT

FELIX MUSAU..... 3rd DEFENDANT

JUDGEMENT

1. The Respondents herein are legal representatives of the estate of **Stephen Kasomo Kimwele** who died on the 30th November, 2012 following injuries received in a road traffic accident on the same day involving motor vehicle reg. no. KBM 507H which, it was pleaded, was registered in the name of the 1st Appellant and which was being driven by or were actually or beneficially owned by the 2nd and 3rd Appellants. As a result of the said accident, which was caused by the negligence of the driver, the deceased who was on board the said vehicle sustained fatal injuries.

2. The suit was in respect of a claim for compensation under both the *Fatal Accidents Act* and the *Law Reform Act* in which the Respondent claimed General Damages, Special Damages, Costs and Interests, particulars of which were pleaded.

3. In her judgement, the Learned Trial Magistrate found that liability against the Appellants was determined at 100% in Civil Suit No. 868 of

2014 which was the test suit and proceeded to deal with quantum. She proceeded to award a total sum of Kshs 7,743,724.00 with costs.

4. Aggrieved by the said decision, the Appellants have lodged this appeal challenging the assessment of damages.

5. On loss of dependency, it was submitted that the trial court erred by holding that the deceased was earning Kshs. 160,000/- per month and rounded off the figure to Kshs. 150,000/- yet there was no evidence and should therefore have applied the minimum wage. It was submitted that the court only picked April 2011 and used the income for that isolated month to arrive at an income of Kshs 167,172/- without giving a reason as to why the court rounded the figure to Kshs. 150,000/- without any evidence since, in cross examination, the Respondent's testimony was that she did not have any documents for the late husband's business. All she had was a Registration Certificate for the material business but never produced any KRA returns or any audited accounts for the said business.

6. It was submitted that the trial court erred in that it failed to find that the bank statements was not proof of income but simply business transactions and therefore not reliable to use it as the basis for loss of dependency.

7. It was contended that the trial court erred in finding that in April 2011, the deceased earned Kshs 1,010,000/= and that the Respondent was earning Kshs. 167,172/= when there was no such a basis for finding so. In the appellants' view, the amount contained in the statements, are at best amounts involved in the deceased's business transactions but does not prove what the deceased was earning. Accordingly, the trial court erred to hold that the statements proved the deceased's earnings in the absence of KRA returns and audited accounts.

8. The Court was therefore urged to set aside the award for Kshs. 7,200,000/= in the absence of proof of earnings the trial court as that court should have been guided by the minimum statutory wage of Kshs 12,000/= as reasonable income based on the decision in **Damaris Wanthi Musyoka vs. Hussein Daisy Ltd Nairobi (2012) eKLR**. In the appellants' opinion, the award should therefore be;

$$\text{Kshs } 12,000/- \times 6 \times 12 \times 1/3 = \text{Kshs } 288,000/-.$$

9. Since the deceased's only dependant was the Respondent, it was urged that the ratio of 1/3 would suffice.

10. In opposition to the appeal, it was submitted on behalf of the Respondent that the trial court award Kshs 200,000.00 for loss of expectation of life. However, the respondent sought to be awarded Kshs. 400,000/= under this head, citing authority of **Waweru, J in Violet Jeptum Rahedi vs. Albert Kubai Mbogori (2013) Civil Suit No. 676 of 2009** where court was awarded Kshs. 150,000/=. The appellants on the other side suggested before trial magistrate Kshs. 100,000/= as sufficient to compensate the respondent under this head, citing the case of **Kenya Power Limited vs. James Matata & others**, where the court upheld an award of Kshs 100,000/= under this head. It was submitted that it is not in contention that the deceased was a health energetic and an ambitious businessman and that his dreams were cut short by the subject road traffic accidents. In the instant case the learned trial magistrate considered the cases cited where a sum of between Kshs. 100,000/= to Kshs. 150,000/= was awarded. He considered the age of the deceased, his expectation and ambitions in life and life expectancy currently in Kenya and found it reasonable to award Kshs. 200,000/= as loss of expectation. It was submitted that since **assessment of damages lies in the discretion of the trial court**, it is clear from the above analysis and cited authorities that the learned trial magistrate did not error in any law or principle in making awards in these head and the said awards cannot be termed as inordinately too high as to present an entirety erroneous estimate of compensation to which the respondent was entitled and as such we humbly call upon this honourable court to uphold the learned trial magistrate award on this head.

11. On the challenge to award for loss of dependency, it was submitted that the respondent submitted before the learned trial magistrate a suggestion of Kshs. 16,048,512/= while considering the multiplier approach method. On the other side the appellants suggested Kshs. 288,000/= also considering the multiplier approach method. Based on that, it was contended that the approach used in awarding Loss of dependency is not in contention as the same was suggested by both parties and the learned trial magistrate adopted the same approach. The bone of contention is on the factors used in computing the award under this head.

12. According to the Respondent, it is not in dispute that the deceased herein was aged 48 years at the time he met his death. He was a known businessman in real estate and other businesses. The Respondent cited the case of **Violet Jeptum Rahedi vs. Albert Kubai Mbogori (2013) Civil Suit No. 676 of 2009**, where the court noted that employment in the private business cannot be limited by the formal retirement age. In the same light the learned trial magistrate noted that life expectancy is 70 years and the deceased being a businessman he could have probably engaged with his businesses until after 60 years. In this regard the learned trial magistrate adopted a multiplier of 12 years, a figure the Respondents view as reasonable and well explained and as such there was no error in adopting the same.

13. It was submitted that the respondent testified before court on oath and produced documents in support of the deceased occupation and earning. She testified before learned trial magistrate that the deceased was a businessman, involved in real estate and made income from the said business. The respondent produced a bank statement showing entries of cash that were deposited into the deceased bank account for the year 2011 and 2012 which amount to over Kshs. 4.5 million. From the evidence tendered before the trial court, it cannot be said that the deceased was a casual labourer or his income was not known so as to apply a minimum wage.

14. It was noted that from the bank statement produced before trial court, in a period of 2 years the deceased had an income totalling to Kshs. 4,512,465.80/=. therefore on average he had a monthly income of Kshs. 188,019.38/=. Based on this undisputed evidence, it was contended that the learned trial magistrate considered the available facts and evidence and correctly adopted a multiplicand of Kshs. 150,000/= after considering relevant adjustments. In the Respondent's view, the figure was considerate and reasonable based on the evidence tendered before court and as such this court should uphold the same.

15. Regarding to dependency ratio, it was submitted that the deceased was a married man, to the respondent herein. He was the sole bread winner for his family, who depended on him entirely. The deceased supported his family financially and emotionally. The respondent testimony to that effect was not challenged. In her submission before the learned trial magistrate, the respondent suggested a dependency ratio of 2/3 guided by **Waweru, J's determination in Violet Jeptum Rahedi vs. Albert Kubai Mbogori(2013) Civil Suit No. 676 of 2009**.

In the Respondent's view, the learned trial magistrate failed to consider the respondent's testimony before court in regard to the fact that the deceased herein was a husband and as any other Kenyan married man he had responsibilities obligated to fulfil. It was never shown that the deceased failed in his responsibilities as a provider and a husband. In fact, considering his ambitious and vibrant business activities it clearly tells you that he had great responsibilities and he did everything possible in his powers to fulfil those obligations. Further, the learned trial magistrate failed to consider respondent's submission in regard to dependency ratio and the authority cited therein, consequently misdirecting himself in awarding a dependency ratio of 1/3.

16. This Court was therefore urged to review the learned trial magistrate award on dependency ration and substitute the same with 2/3 as being most reasonable ratio in the instant circumstance.

17. According to the Respondent, the law on assessment of damages is that it invokes judicial discretion, is a difficult task and an appellate court would not lightly interfere therewith unless it be shown that the trial court in coming to its assessment considered irrelevant issues or failed to consider relevant issues and thereby arrived at an assessment that was wholly and evidently to high and excessive or overly law as to amount to a complete erroneous estimate of damages.

18. The Court therefore urged to dismiss the Appellant's appeal with cost as the same is not sustainable and substitute the learned trial magistrate award under loss of dependency with Kshs. 14, 400,000/=.

Determinations

19. In this appeal, the appellant is only challenging the quantum of damages, particularly the award for loss of dependency. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

20. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

21. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

22. As regards the claim for loss of dependency, the evidence of PW1, **Jack Manthi Kyalo**, was that the deceased was his colleague in the real estate business and that at the time they were earning Kshs 120,000/- per month but because the deceased was a contractor while he was a foreman, the deceased earned more than him. Since the deceased had been in the business longer, he was earning Kshs 150,000.00. In cross-examination, he however conceded that he did not state in his statement that he was doing business with the deceased and the amount they were earning. He also did not produce any supporting documents.

23. PW2, the deceased's wife testified that the deceased, who was aged 48 years, had a tour van stationed at the airport for tourists and he was earning Kshs 150,000.00 - Kshs 70,000/- from real estate, Kshs 60,000/- from purified water, property agent Kshs 30,000/-, training security guards Kshs 50,000.00 hence was making a total of Kshs 310,000.00. Though at the time of the deceased's death she was working, she lost her job a year later. In support of her claim, she exhibited a number of documents including the deceased's bank statements.

24. In cross-examination, she conceded that she did not have any documents for the business but insisted that she knew the deceased's earning because she used to assist him. She admitted that she had no KRA returns or audited accounts. According to her in 5 months the deceased had deposited about Kshs 1.5 million Kenya Shillings.

25. In her judgement, the learned trial magistrate found that the monies were deposited in the deceased's account consistently and in large amounts. She also considered the evidence of the witnesses that the deceased was a businessman involved in real estate and was satisfied that the deceased made income from his businesses. Accordingly, she declined to adopt the minimum wage principle. She found that one of the entries showed a deposit of Kshs 1,010,000/- for the month of April, 2011. Based on the foregoing, she agreed with the sum proposed by the Respondent of monthly income of Kshs 167,172/- which she rounded off to Kshs 150,000.00. Since the wife was the only dependant, she adopted a ratio of 1/3 with a multiplier of 12 years.

26. The Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR expressed itself as hereunder:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

27. The Court was urged to adopt the minimum wage approach in determining the multiplicand. However, in Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR it was held that where income is not proved, the income of an unskilled worker ought to apply. In other words, the minimum wage approach is only resorted to where there is no evidence that the deceased was earning. Where however, as was the case before the trial court, that the deceased was engaged in income generating activities, it would be unjust to adopt the said approach.

28. In this case, the learned trial magistrate found that there was consistent evidence that huge amounts of money were being deposited by the deceased. She found as a fact that Kshs 150,000.00 was the average monthly earning by the deceased. Evidence was placed before her on the basis of which she could make such a finding considering the deceased’s unchallenged business activities. This was not a case where there was no evidence at all that warranted the findings by the learned trial magistrate but where there was evidence on the basis of which factual findings could be made.

29. In my view that being a finding of fact, there is no basis upon which I can interfere with the findings of the learned trial magistrate considering that assessment of damages is in the discretion of the trial court and this court sitting as an appellate court ought not to interfere therewith simply because, were it the trial court, would have arrived at a different finding.

30. In the premises, find no basis to interfere with the assessment of damages.

31. The Respondent urged this Court to interfere with and vary the trial court’s finding on the dependency ratio. Without a cross-appeal, there is no legal basis upon which that finding can be made.

32. In the premises, this appeal fails and is dismissed with costs to the Respondent.

33. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF APRIL, 2021.

G V ODUNGA

JUDGE

Delivered online by email with concurrence of the parties, legal representatives.

CA Geoffrey