



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEALNO. 155 OF 2019

HUSSEIN SHARIFF ALLI.....APPELLANT

VERSUS

GRACE KAREA MUTIA (Suing as the legal representative of

The Estate of JOHN MUTUA (Deceased)).....RESPONDENT

JUDGMENT

1. The deceased succumbed to injuries sustained following a road traffic accident which occurred on or about 3rd June 2018 near Matunda area along Isiolo-Subuiga road involving himself and Motor Vehicle Registration Number KBR 661V Toyota which was being driven by the Appellant. By consent of parties, Judgment on liability was entered in the ration of 75:25 in favour of the Respondent. Following hearing, the Court awarded special damages of Ksh 107,340/=, damages for pain and suffering of Ksh 10,000/=, damages for loss of expectation of life of Ksh 100,000/= and damages for loss of dependency of Ksh 3,000,000/=.

2. The Appellant was dissatisfied with the award on damages and filed the instant Appeal. Vide his memorandum of appeal dated 27th November 2019, he raised the following grounds of appeal: -

i) That the learned Trial Magistrate erred in law and fact by adopting multiplicand of Ksh 25,000/= as the deceased's monthly income which amount was not sufficiently proved so as to form a basis for reliance by the Court.

ii) That the learned Trial Magistrate erred in law and fact by adopting the sum of Ksh 25,000/= as the multiplicand without giving any provision of tax and other statutory deductions whereas the amount falls within the taxable bracket and thereby arrived at an award that is inordinately excessive.

iii) That the learned Trial Magistrate erred in law and fact by adopting multiplier of 15 years whereas the deceased was aged 48 years and thereby arrived at an award that is inordinately excessive.

iv) That the award of the learned Trial Magistrate is against the law and weight of evidence on record.

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

Appellant's Submissions

4. The Appellant filed his submissions which are dated 3rd March 2021. He submitted on all grounds jointly as they all challenge the award made under the loss of dependency. He submits that the multiplier of 15 years was on the higher side considering the deceased was aged 48 years at the time of death and that the trial Court failed to consider the several vicissitudes and uncertainties of life that would have probably curtailed the life of the deceased before he reached the age of 63 years applied by the trial Court. He submits that the multiplier adopted should be in consideration of the various imponderables of life and the current life expectancy on the country. He relies on the case of ***Edner Gesare Ogega v Aiko Kebiba (Suing as father and legal representative of the Estate of Alice Bochere Aiko – Deceased)*** where the Court upheld a multiplier of 20 years where the deceased was aged 17 years at the time of death.

5. On the multiplicand of Ksh 25,000/= he submits that during cross examination, it was confirmed that the Respondent had no pay slips to prove the earnings of the deceased. Concerning the letter by the Bishop, he submits that the said letter is not signed by the author and it does not reveal the terms of employment of the deceased. He submits that it is trite that he who alleges must prove and that the Respondent was under a duty to prove the earnings of the deceased and that the trial Court erred in shifting the burden of proof to him.

6. He further submits that the Court adopted the salary of Ksh 25,000/= without giving any provision for tax and other statutory deductions and that the letter by the Bishop does not disclose whether the said sum was net or basic pay. He submits that this amount falls under the

taxable income bracket and it was therefore erroneous for the Court to adopt the amount of Ksh 25,000/=. He further submits that the deceased's certificate of death shows his occupation as being a peasant thus evincing a contradiction.

7. He submits that where the issue of the amount earned by a deceased and their profession is unsettled, the Court adopts a global sum instead of delving into estimating incomes as held in the case of *John Wamae & 2 Others v Jane Kituku Nziva & Another (2017) eKLR* wherein the other cases of *Mary Khayesi Awalo & Another v Mwilu Malungu & Another Eld HCCC No. 19 of 1997 (1999) eKLR* and *Mwanzia v Ngalali Mutua Kenya Bus Ltd* were cited. He submits that this was one such case where the trial Court ought to have adopted a global figure since there was no pay slip to prove earnings, the issue of tax and statutory deduction was unclear and the death certificate showed the deceased's occupation as a peasant. He prays that the award on loss of dependency be discounted to a global sum of Ksh 400,000/= which should then be subjected to liability apportionment.

Respondent's Submissions

8. The Respondents filed her submissions which are dated 24th March 2021. She submits that liability is not in dispute having been agreed by consent of parties in the primary suit in the ratio of 75:25 in her favour. She submits further that the awards on special damages, pain and suffering and the ratio of 2/3 applied are not being challenged.

9. She submits jointly on grounds number 1 and 2 which are on the multiplicand of Ksh 25,000/= per month and the alleged tax and other statutory deductions. She submits that the trial Court was right in applying the multiplicand of Ksh 25,000/= because at paragraph 4 and 6 (i) of the Plaint, it is pleaded that the deceased was a pastor serving in the African Mission Church earning a net monthly income of Ksh 25,000/= and that this fact was also confirmed at paragraph 2 of her statement of evidence wherein she also confirmed being the widow of the deceased and it was further confirmed at paragraph 2 of the statement of evidence of the deceased's son, one Robert Kaume. She also submits that the letter dated 20th July 2018 and duly stamped and signed at the bottom by Bishop Geoffrey Mutuma of African Mission Church confirmed that the deceased was a pastor and his monthly salary was Ksh 25,000/=. She submits that this being a civil matter, the standard of proof is on a balance of probabilities and they urge that on such balance, the occupation and income of the deceased was satisfactorily proved.

10. On the allegations of tax and other statutory deductions alluded to a ground number 2 of the record of appeal, she urges that the same should be dismissed because as per the Plaint, the said Ksh 25,000/= was the deceased's net monthly income and further, that this issue was never raised in the primary suit, either in his statement of defence or during cross examination. Relying on the case of *Jacob Ayiga Maruja & Another v Simeon Obayo (2005) eKLR*, she submits that production of certificates and documents are not the only way of proving profession and earnings.

11. On ground number 3 with respect to the multiplier of 15 years adopted by the trial Court, she submits that the deceased, having died at the age of 48 years and having been a pastor, would have lived for many more years because pastoral work is not a risky engagement. Relying in the case of *Nairobi Civil Appeal No. 142 of 2003 Loise Wanjiku Kagunda v Julius Gachau Mwangi*, she submits that the maximum active working age has been held to be 80 years and going by this authority, the trial Court had the latitude to apply a multiplier of up to 32 years but it exercised its discretion and applied a multiplier of 15 years.

12. She submits that the award made by the trial Court was well reasoned, having been anchored on sound and unchallenged evidence, coupled with proper application of the law. Citing the case of *Mbogo & Another v Shah (1968) EA*, she urged that this Court should not interfere with the findings of the trial Court. She prays that the appeal be dismissed in entirety and costs thereof be awarded to herself.

Issues for Determination

From the Memorandum of Appeal and submissions by parties, all the issues arising for determination point to quantum of damages as follows: -

i) Whether the Court erred in adopting a multiplier of Ksh 25,000/=.

ii) Whether the Court erred in adopting a multiplicand of 15 years.

Whether the Court erred in adopting a multiplier of Ksh 25,000/=

13. The basis of adopting the multiplier of Ksh 25,000/= was as per the evidence of the Respondent. The deceased's widow and his son both confirmed that he worked as a Pastor and he earned this amount. This fact was also confirmed by Bishop Geoffrey Mutuma's letter dated 20th July 2018 confirming that the deceased worked at the African Mission Church earning the said amount of Ksh 25,000/=. Although the Appellant states that the said letter is unsigned, the same is stamped by the stamp of the Church. Furthermore, the objection to the production of this document ought to have been raised at the hearing stage and not at appeal stage.

14. This Court agrees with the submissions made by the Respondent that proof of earnings is not limited to production of documents and certificates. See the case of *Jacob Ayiga Vs Simon Obayo (Suing as personal representatives of the Estate of Thomas Ndaya Obayo) (2005) eKLR*. To hold otherwise would do injustice to a lot of Kenyans who are illiterate and some of who have no records of their employment. In the present case where the deceased was a Pastor, it is not uncommon to have Pastors who work without any formal structure of employment. Indeed, the formalities in employment for such occupation would depend on the nature of the church and the administration structure if any. The well established churches with great outreach would have more profound structures and operational systems including human resource personnel, but not so for many other smaller churches.

15. On the matter of the death certificate having indicated that he is a peasant, this Court finds that the death certificate is not the only

document to be relied upon in determining the deceased's occupation.

16. On the question of whether this amount of Ksh 25,000/= was gross or net salary, the Court agrees that indeed, this ought to have been specified. Nonetheless, this Court finds that this uncertainty is not reason good enough to disentitle the Respondent of this award. This Court is alive to the reality that many Kenyans earn their salary in cash without being given any pay slips. It is true that where the occupation of the deceased is unknown and it is not possible to project what his future would have turned out, the Court will be obliged to adopt a global figure. This is however majorly the case in cases where the deceased is an infant who was yet to join school or was still in their foundational years of education. Not so for a 48 year old man who had practiced his profession of pastoral work for years.

17. In this civil matters, the standard of proof is on a balance of probabilities and this Court finds no reason to disturb the trial Court's finding on this issue since on a balance of probabilities, the occupation and earnings of the deceased were proven.

Whether the Court erred in adopting a multiplicand of 15 years.

18. The deceased died at 48 years of age. Being a pastor and peasant, he would have worked up to the age of retirement. Furthermore, pastoral work is ordinarily calling and one would be at liberty to work even past the normal age of retirement. There is no indication that the deceased was of ill health. This Court finds that the multiplier of 15 years was justified.

Conclusion

19. This Court is not convinced that the trial Court exercised its jurisdiction erroneously and/or misapplied the principles with respect to quantum of damages. The multiplier of KSh 25,000/= was arrived at following adducing of evidence and the multiplicand of 15 years was arrived at based on a reasonable projection of the number of years the deceased would have worked up to.

20. The principles for the appellate interference with award of damages are reiterated by Court of Appeal in ***Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003*** as follows: -

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).'

21. This Court does not find any reason to disturb the trial Court's on damages.

ORDERS

22. In the end, this Court makes the following orders: -

i) The Appellant's Appeal is hereby dismissed.

ii) The Respondents shall have the costs of the Appeal.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the Appellant

M/S Carlpeters Mbaabu & Co. Advocates for the Respondent.