



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 35 OF 2019

**SAMUEL MUTITU NDERITU (Suing on his own behalf and as Legal Representative of the Estate of
GLADYS MURINGI NDERITU- Deceased).....APPELLANT**

VERSUS

ERASTUS MUTAHI MUGAMBI.....RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. H. Adika,

Senior Resident Magistrate delivered on 6th May 2019

in

Nyeri CMCC No. 129 of 2013).

JUDGEMENT

Brief Facts

1. This appeal arises from the claim that arose from a road traffic accident that occurred on 9/1/2012 along Othaya - Ndunyu Road near Gakuyu Secondary School, involving the deceased and motor vehicle registration number KBL 649F.

2. The appellant is the legal representative of the estate of the deceased, Gladys Muringu Nderitu. He sued for special and general damages under the Law Reform Act and the Fatal Accident Act.

3. The trial court found the respondent 100% liable for the accident and awarded general damages as follows:-

- | | |
|--------------------------------|-----------------|
| a) Pain and suffering | Kshs. 10,000/- |
| b) Loss of Expectation of life | Kshs. 100,000/- |

4. Being aggrieved by the decision of the trial court, the appellant lodged this appeal citing several grounds which may be summarised as follows:

The Learned Magistrate erred in law and in fact in:-

- Awarding the appellant an award that is inordinately too low under the head of pain and suffering ;
- Dismissing the appellant's claim under the head "loss of dependency"
- Failing to award special damages yet the appellant specifically pleaded and proved the same;
- Failing to award costs of the suit.

5. By consent, parties agreed to exchange written submissions in disposal of this appeal.

Appellant's Submissions

6. The appellant submits that the award of Kshs. 10,000/- for pain and suffering is too low and ought to be substituted with Kshs. 70,000/- based on the fact that the deceased's cause of death as per the post mortem report and that she must have undergone extreme and excruciating pain and suffering before she succumbed to her injuries. Reference was made to the case of **Alice O. Alukwe vs Akamba Public Road Services Limited & 3 Others [2013] eKLR**.

7. The appellant submits that he produced a letter of the area Chief, Mahiga Location, dated 19th June 2012 which shows that the deceased was survived by five (5) children. The appellant stated in his statement and during the hearing that the deceased was survived by three daughters and two sons. It is argued that the respondent did not contest the fact that the deceased was survived by the said number of children. However the trial court in its judgment, held that since the appellant had not listed the deceased's children on the plaint, none was dependent on him thus dismissing the claim for loss of dependency. Although the appellant testified that the children are all adults and married, it is reasonable to infer that the deceased raised them and also incurred other expenses at her home in Othaya where she resided and carried out farming as an occupation. The appellant makes reference to the case of **A Dainty vs Haji & Another [2004] 2 KLR 125** in support of his argument.

8. The appellant urges this court to find that 2/3 two-thirds, dependency ratio is most suitable herein and relies on the following case law to support his contention. **Chania Shuttle vs Mary Mumbi [2017]eKLR and Jane Chelagat Bor vs Andrew Otieno Onduu [1988-1992] 2 KAR 288 cited in Coast Bus Company vs Joseph Maundu Mukusu suing as next of kin of Jane Paul Mang'eng'e Tabitha Muthoki Mang'eng'e and Paul Mang'eng'e (deceased) [2019] eKLR**. The appellant also relies on the case of **Isaack Kimani Kanyingi & Another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellen Wanjiru Rukanga [2020] eKLR** where the court awarded Kshs. 3,400,000/- and set aside the order of the trial judge awarding nil for loss of dependency.

9. The appellant submits that he produced a death certificate as proof that the deceased was 62 years and that she was a farmer. Since there is no retirement age for farmers, the deceased would have worked till the age of 75 years. Thus the appellant submits that a multiplier of 13 years would be reasonable. The appellant relied on the cases of **Elizabeth Mary Adembesa; Hardev Kaur Dhanoa vs Multiple Hauliers (E.A) Ltd [2013] eKLR; Joseph Kahiga Gathii & Another vs World Vision Kenya & Others [2010]eKLR; Stephen Onsumu Kibagae vs Rebeka Mwangi Simion & Another [2014] eKLR and David Bore vs Johnson Masika [1998]eKLR** to support his contention. On the issue of the multiplicand, the appellant submits that the sum of Kshs. 5,000/- ought to be used since the deceased was a farmer earning an income of over Kshs. 5,000/-. Therefore under the head loss of dependency, the appellant submits that Kshs. 520,000/- would be sufficient as damages for loss of dependency.

10. The appellant relied on the case of **Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR** and submitted that he claimed for Kshs. 43,680/- for special damages and produced 2 receipts for Kshs. 5,400/- in support thereof. The appellant pleaded for Kshs. 23,250/- for funeral expenses and submitted that the said sum is reasonable. In this regard the appellant relied on the cases of **Marion Njeri Kago vs Kenya Railways Corporation HCCC No. 828 of 2003; Premier Diary Ltd vs Amarjit Singh Sagoo & Another Court of Appeal No. 312 of 2009; Alice O. Alukwe vs Akamba Public Road Services Ltd & 3 Others [2013] eKLR and Jacob Ayiga Maruja & Another vs Simeon Obayo (2005) eKLR**.

11. The appellant submits that he pleaded Ksh. 20,000/- as legal fees for obtaining a limited grant in High Court Succession Cause No. 671 of 2012 and urges this Honourable court to take judicial notice of Order 10 of the Advocates Remuneration Order, 2014 and find that Kshs. 20,000/- is just and reasonable as legal fees towards obtaining a limited grant. As such, the appellant submits that he has proved his claim for special damages as outlined above.

12. On the issue of costs, the appellant relies on **Section 27 of the Civil Procedure Act and the cases of Super marine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR; Party of Independent Candidates of Kenya vs Mutula Kilonzo & 2 Others, HC EP No. 6 of 2013 and Farah Awad Gullet vs CMC Motors Group Limited [2018] eKLR** and submits that costs follow the event unless the court shall for good reasons otherwise order. The trial court herein did not provide any sufficient reasons to deny the appellant costs yet it found the respondent 100% liable. The appellant therefore urges this Honourable court to interfere with the exercise of discretion by the trial court and award the appellant costs of the suit.

13. The appellant concludes his submissions by stating that the trial court failed to apply the correct principles and took into account extraneous issues and failed to apply statutory law and guidance properly thus acting arbitrarily and exercised its discretion wrongly thus occasioning miscarriage of justice. The appellant thus tabulates that the damages which ought to be awarded to him is as follows:-

- | | |
|--------------------------------|---------------|
| a) Pain and Suffering | Kshs. 70,000 |
| b) Loss of Expectation of life | Kshs. 100,000 |
| c) Loss of Dependency | Kshs. 520,000 |
| d) Special Damages | Kshs. 43,680 |
| e) Costs of the suit | |

Respondent's Submissions

14. The respondent submits that the award of Kshs. 10,000/- for pain and suffering is justified because the deceased died on the spot. This is not disputed and the trial court took into account the period in which the deceased took before succumbing to his injuries. The respondent relies on the cases of **Samuel Njoroge Kamunya vs Lucy Wambui Kibe and Moses Koome Mithika & Another vs Doreen Gatwiri &**

Another (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (Deceased) [2020] eKLR.

15. The respondent further submits that dependency is a question of fact which should be proved at trial. The appellant herein stated that he was not depending on the deceased and further that no dependants were listed on the plaint. It was his testimony that none of the children of the deceased used to depend on her. On the question of income, the appellant admitted that he did not know the income of the deceased. As such, the trial court was correct in finding that dependency was not proved. The respondent further submits that the deceased was probably depending on her children, due to her age, and not vice versa. The respondent relies on the cases of **Chania Shuttle vs Mary Mumbi [2017] eKLR and Beatrice Wangui Thairu vs Hon. Ezekiel Barn'etuny & Another.**

16. The respondent submits that the appellant did not prove that he or any of the deceased's children depended on her nor did he give any particulars as required under Section 8 of the Fatal Accidents Act. Contrary to the appellant's testimony that he produced a letter from the chief, no such document was produced.

17. On the issue of special damages, the respondent submits that although the appellant pleaded for an award of Kshs. 43,680/- only a receipt for Kshs. 5,400/- was produced.

18. The respondent concludes his submissions by stating that the law grants a judicial officer the discretion to award costs. As such, the court herein exercised its discretion and did not award costs. Further, the respondent submits that he defended most of the claims successfully and thus the order was justifiable. Given that the suit herein is a fatal claim, the respondent submits that he will not insist on costs of the appeal so that the discretion is seen as having been exercised in a fair manner. The respondent prays for the dismissal of this appeal and that each party bears their own costs.

Issues for determination

19. On perusal of the Record, the Memorandum of Appeal and the submissions, four issues for determination are hereby identified as follows:-

- a) Whether the award on pain and suffering was inordinately too low;
- b) Whether dependency was proved;
- c) Whether the trial court erred in rejecting part of the appellant's claim for special damages;
- d) Whether the appellant was entitled to an award for costs.

The Law

20. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

21. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

22. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

23. Therefore this Court is under a duty to deal with factual details and revisit the facts as presented before the trial court, analyse the same, evaluate and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

24. This appeal is only for quantum of damages. The assessment of damages are matters within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised. This was aptly expressed by the Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited [2015] eKLR** thus:-

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 arrived at a figure, which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the

damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.”

Whether the award on pain and suffering was inordinately too low

25. In the case of **Sukari Industries Limited vs Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR** where the deceased died immediately after the accident and the trial court has awarded Kshs. 50,000/- for pain and suffering, Majanja J. splendidly captured the spirit of the law on the issue and stated that:-

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court the sums awarded range from Kshs. 10,000/- to Kshs. 100,000/- over the last 20 years hence I cannot say that the sum of Kshs. 50,000/- under this head is unreasonable.”

26. Similarly **Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the court observed that:-

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering, the award ranges from Kshs. 10,000/- to Kshs. 100,000/- with higher damages being awarded if the pain and suffering was prolonged before death.”

27. The deceased herein died on the spot and the trial court made an award of Kshs. 10,000/- for pain and suffering. The appellant contends that the award is too low. Following the principles set out in the above case law, and considering the range of awards in similar cases, as well as factors of inflation, the award of Kshs.10,000/= was inordinately low when this decision was rendered in the year 2019. I therefore set aside the said award and substitute it with a sum of Kshs.50,000/=.

Whether dependency was proved by the appellant.

28. Dependency is a matter of fact and must be proved by evidence as was held in the case of **Abdalla Rubeya Hemed vs Kayuma Mvurya & Another [2017] eKLR:-**

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

29. In **Rahab Wanjiru Nderitu vs Daniel Muteti & 4 Others [2016] eKLR** the court held that:-

“The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.”

30. On perusal of the plaint, it is noted that the appellant did not list in the plaint any of the dependants of the deceased. Further, on cross-examination, the appellant stated that the deceased was survived by five children who were all over 18 years and that none of them depended on the deceased. Furthermore, the appellant did not adduce any evidence of any form to show proof of the deceased’s dependants. The income of the deceased was not proved either.

31. In that regard, I do find that the appellant failed to prove dependency. I uphold the trial court’s finding that the appellant was not entitled to an award on the said item.

Whether the trial court erred in rejecting the appellant’s special damages claim.

32. In **Premier Diary Limited vs Amarjit Singh Ssagoo & Another [2013] eKLR** the Court of Appeal took the view that:-

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to but or otherwise inter that their relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The Learned Judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/- was pleaded in the plaint and witnesses who were the relatives of the deceased testified that they spent much more than this in preparing for and conducting a cremation, the learned Judge awarded a sum of Kshs. 150,000/ which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

33. Similarly in Capital Fish Kenya Limited vs The Kenya Power and Lighting Company Limited [2016] eKLR:-

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved...We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food, etc. However, the claim herein did not fall in that class.”

34. Further in the case of JNK (Suing as the Legal Representative of the Estate of MMM (Deceased) vs Chairman Board of Governors Boys High School [2018] eKLR Gikonyo J. having made reference to the above case held:-

“In spite of lack of receipts, this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

35. Applying the principles the foregoing cases, it is prudent to acknowledge that the appellant did incur funeral costs which he has pleaded at Kshs. 23,250/-. I am of the considered opinion that the sum of Kshs. 23,250/- is just and reasonable for burial expenses and that it ought to be awarded.

36. I therefore set aside the order rejecting special damages of Kshs.23,250/= and hereby award the said sum to the appellant.

37. On the sum of Kshs.20,000/= being legal expenses in Nyeri High Court Succession cause No. 671 of 2012, the appellant did not produce any receipt for court filing fees or for advocates fees. Although a copy of limited grant was produced in evidence, the appellant was obligated to produce receipts as proof of the said expenses. As such, the sum of Kshs.20,000/= claimed has not been proved and thus ought not to be allowed.

Whether the appellant was entitled to costs.

38. The statutory provision that governs costs is **Section 27 of the Civil Procedure Act** which states:-

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court of the Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.

(2) The Court or Judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

39. From the above statutory provision, two main principles emerge. That costs are awarded at the discretion of the court and that they follow the event, unless with good reason the court declines to award the same.

40. In Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2002] eKLR observed that:-

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However the vital factor in setting the preference is the judiciously exercised discretion of the court; accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to during and subsequent to the actual process of litigation.”

41. In Super marine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006) the court stated inter alia that:-

“Costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order....Thus where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule.”

42. Similarly in James Koskei Chirchir vs Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005) the court held inter alia:-

“Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the court. The Court did not however explain why it denied the appellant his costs before. In absence of any explanation in that regard we think

that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial court.”

43. Applying the above threshold to the rival arguments on the issue of costs, it is my considered opinion that this court ought to interfere with the discretion of the trial court and award costs in his instance for the reason that the appellant was the successful party in the suit and ought to be awarded costs. Notably, the trial court did not give any reason for declining to award costs to the appellant.

44. The failure to award costs to a successful plaintiff and the failure to give reasons or point at any peculiar circumstances was wrong and did not amount to exercise of the discretion of the court. The magistrate erred in law in denying award of costs to the appellant.

45. I hereby award costs of the suit to the appellant to be assessed by the Deputy Registrar of this court.

46. The court hereby tabulates the award in favour of the appellant as follows:-

- | | |
|--------------------------------|-----------------|
| a) Pain and suffering | 50,000/- |
| b) Loss of expectation of life | 100,000/- |
| c) Special damages | <u>23,250/-</u> |

173,250/-

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47. Judgement is hereby entered in favour of the appellant against the respondent for Kshs.173,250/- plus costs for the suit in the court below and for his appeal.

48. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 3RD DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 3RD DAY OF JUNE 2021.