



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
CIVIL APPEAL NO. 60 OF 2018

JOHN KIMANI MWANGI (suing as administrator of the estate
of CHARLES NYINGI MWANGI).....APPELLANT

VERSUS

ASPENDOS DAIRY LIMITED.....RESPONDENT

[An appeal from the judgment of P. Kiama, Senior Principal Magistrate, in Kangema SPMCC No. 25 of 2017 delivered on 7th November 2018]

JUDGMENT

1. The appellant takes up cudgels on the assessment of damages by the lower court for a fatal road accident. The appeal is opposed.
2. By a written consent dated 26th May 2020 the parties agreed that the appeal be determined through written submissions. The appellant's submissions were filed on 31st August 2020 while those by the respondents were lodged on 14th April 2021.
3. Being a first appeal to the High Court, it is on both facts and the law. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
4. There are only two grounds of appeal in the *amended memorandum of appeal* dated 18th August 2020. Firstly, that the award of Kshs 10,000 for pain and suffering was inordinately low; and, secondly, that the learned trial magistrate erred in finding "that the plaintiff was based on loss of dependency when there was no such claim and failed to award the estate damages for lost years under the Law Reform Act".
5. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309.
6. On 15th April 2016, the deceased was knocked down by the respondent's vehicle and died. The appellant's witness (PW1) testified in cross-examination that-

After the accident, I was called [sic] to Murang'a Hospital and found he [deceased] was in the mortuary. I would say the deceased died on the spot. [underlining added].

7. Learned counsel for the appellant submitted before me that the only reason the deceased was rushed to the hospital was that he was still alive. Unfortunately, there is no evidence to back it up. As I have stated, the appellant testified that the deceased died *on the spot*. The learned trial magistrate awarded Kshs 10,000 for pain and suffering.
8. I accept the wisdom of Waki, Kiage and Mohammed JJA in *Koigi Wamwere v Attorney General*, Nairobi, Court of Appeal, Civil Appeal 86 of 2013 [2015] eKLR that an *award of damages is not an exact science; and, no monetary sum can really erase the scarring of the soul*. The evidence on record shows the deceased died *immediately* after the accident. I cannot say that the sum awarded was inordinately low; or, that the learned trial magistrate applied wrong principles in assessing the damages for *pain and suffering*. The appeal on that ground fails.
9. I will now turn to the second ground. Parties are bound by their pleadings. In the plaint dated 24th August 2015, the plaintiff prayed for special damages of Kshs 64,000; general damages under the **Law Reform Act** plus costs and interest. The two heads of damages recoverable under that Act were rightly awarded by the lower court which is to say *loss of expectation of life*; and, for *pain and suffering*.

10. I agree that the appellant never sought damages under the **Fatal Accidents Act**. Although no damages were awarded for *loss of dependency*, it was a misdirection for the lower court to try to assess them. The appellant submits that his claim was *lost years*. This ground fails for a number of reasons. Firstly, the claim for lost years is in the nature of special damages. At paragraph 5 of the plaint, it was pleaded as follows-

At the time of his death the deceased was aged 49 years, enjoyed good health and led a vigorous and robust life. He worked as a farmer and businessman earning an average monthly income of shs 30,000. [underlining added].

11. Those allegations in the plaint were specifically *denied* by the respondent at paragraph 7 of the *statement of defence* dated 6th February 2018.

12. It thus fell upon the appellant to prove the *earnings* by the deceased and the attendant loss to the *estate*. But when the plaintiff, who was the sole witness, testified he did *not* lead any or sufficient evidence on the deceased's income. He said the deceased was *not* married and had *no* children. He stated further-

The deceased was aged 49 years. He dealt with farm produce and sold coffee. The deceased had a shop in the centre. I have no document to show how much money the deceased made in business. [underlining added].

13. Learned counsel for the appellant Mr. Kimani submitted in this appeal that the court should apply a multiplicand of 30,000 and a multiplier of 15 years. He thus proposed an award to the estate of Kshs 2,700,000.

14. I accept that the estate of the deceased is entitled to claim for the loss. However, based on the appellant's evidence in the lower court that I have highlighted above, there was *no* proof whatsoever of the earnings by the deceased. No firm foundation was also laid to enable the lower court to assess such damages. It must follow as a corollary that the appellant's claim under the **Law Reform Act** was not proved on a balance of probabilities.

15. The upshot is that the appeal is devoid of merit and is hereby dismissed.

16. Costs follow the event and are at the discretion of the court. The appellant shall have costs in the *lower court*. However, each party shall bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF JULY 2021

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.