



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 88 OF 2013

WAMALWA WANDIAKA

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GRACE WANDIAKA)

VERSUS

SAMUEL MWENJERI.....1ST RESPONDENT

JULIA WANGARE.....2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. S MUNGAI

(CHIEF MAGISTRATE) IN CIVIL CASE NO. 1539 OF 2009 NAKURU DATED 15TH MAY 2013).

JUDGEMENT

1. This appeal stems from an accident that occurred on **1st May 2009** involving the deceased and motor vehicle registration number KAT 710 L. The plaintiff sued in the capacity of a legal representative of the Estate of the deceased sister Grace Wandiaika who died in the said accident vide suit **No. Nakuru CMCC No. 1539 of 2009**. The deceased was a passenger in the said motor vehicle and it was averred that the said motor vehicle was being negligently driven along Nairobi -Nakuru highway.

2. The matter proceeded to its conclusion where the court rendered it's judgement and defendants were held 100% liable. On quantum the court awarded Kshs. 20,000 for pain and suffering, Kshs. 120,000 for loss of expectation of life, but it failed to award anything for loss of earnings and special damages.

3. The appellant who was the plaintiff in the original suit, being aggrieved by the judgement of the trial court, has filed a memorandum of appeal under the following grounds;

a) That he Learned Trial Magistrate erred in fact and in law by finding that the Appellant had not proven his case on a balance of probabilities as regards the Deceased's employment and/ or source of income prior to his death.

b) That the Learned Trial Magistrate erred in fact and in law by misdirecting himself that the Appellant had not proved loss of dependency on a balance of probabilities and proceeded not to award the same.

c) The Learned Trial Magistrate erred in fact and in law by failing to award special damages which were pleaded and proved to the required standard.

d) The Learned Trial Magistrate erred in law and in fact in disregarding and/or ignoring the evidence adduced by the Appellant in his testimony, the exhibits produced and his submissions against the Respondent with regard to loss of dependency and special damages.

e) That the Learned Trial Magistrate erred in law and in fact in disinheriting a minor despite the case having been established and proved.

f) That the Learned Trial Magistrate erred in law and in fact in failing to assess damages payable to the appellant under loss of dependency.

4. Before looking at the merit or otherwise of this appeal it shall be necessary to summarize the evidence as presented during trial.
5. **PW1 P C STEPHEN LONGOPITO** from Nakuru traffic base produced the police abstract indicating that the accident occurred. He said that the same was self-involving and the deceased was a passenger therein.
6. **PW2 WAMALWA WANDIAKA** testified that he was the brother to the deceased who was unmarried but had one child, a son. He said that she used to work for a micro finance that lends money. She was earning a salary of about Kshs 5000 to 7000 per month. After her death he applied for letters of administration which he was granted and he also produced the death certificate as well as her son's certificate of birth.
7. The witness also produced the receipt for the legal fees amounting to Kshs.25000 paid to the counsel who procured the limited grant. He said that as a result of her death he was now taking care of the deceased child who was by then 13 years.
8. **PW2 ESTHER ISUA MWAVUNGA** testified that she sells clothes and that on the material day she travelled with the deceased aboard the ill-fated vehicle. She said that the driver was over speeding and despite pleas from the passengers he did not heed. She blamed the said driver for causing the accident.
9. There was no evidence from the respondent and they closed their case.
10. The appeal was canvassed by way of written submissions as directed by the court when issuing directions. Only the appellants filed their submissions despite the respondent being given sufficient opportunity.

Appellant's submissions

11. The appellant submitted that the deceased was working for a micro finance five months prior to her death and was also running a small business and would make between Kshs. 5,000 and Kshs. 7000 every month. It is the appellant's submissions that the fact that the deceased's employment was not proved by way of documentation does not warrant failure to award under that limb. The deceased had a child who depended on her and this would mean that she made enough to provide for her dependents.
12. The appellant submitted that not every Kenyan is able to avail proof of earnings as many employers pay their employees in cash. That is why they relied on the minimum wage of Kshs. 8,800 under the **Regulation of Wages (General) (Amendment) Order, 2012**. This guides not only on how much is to earn, but also on how much a person was earning under a specific job group like in this case.
13. The appellant placed reliance on the case of **Jacob Ayiga Maruja & another v Simeon Obayo Civil Appeal No. 167 OF 2002, Justices Omolo, Tunoi & Githinji, J.J.A** as relied on in **Michael Murigi Karanja V Mohammed Salim Kassam 2015 eKLR** where it was held that;

“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 to prove 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.”

He urged this court to align with the above sentiments and find that sufficient proof of earnings was proved and award the deceased's earnings under the minimum wage in accordance with the **Regulation of Wages (General) (Amendment) Order, 2012**.

14. On the issue of loss of dependency, the appellant submitted that the deceased had a child at the time of her death as per the attached birth certificate and she was the sole provider. The appellant submitted that a birth certificate is sufficient proof of dependency as no contrary evidence was produced to controvert that fact. He submitted that the trial magistrate erred in disowning the deceased's child whose existence was properly proven. The appellant supported her sentiments with the authority of **Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR** and urged the court to find that the trial magistrate erred in finding that dependency was not prove and award the same.
15. The appellant urged the court to rely on a multiplier of 35 years since the deceased died at 30 years and was in good health at the time of her death with chances of long and healthy life. The appellant relied on the case of **Fredrick Gataka Mungai v George N. Kibumyi & Another** and proposed a computation as follows; $8800 \times 2/3 \times 35 \times 12$ totaling to Kshs. 2,464,000.
16. On whether special damages were specifically pleaded, the appellant submitted that she produced a receipt for the grant ad litem for Kshs. 25,000, the same had been pleaded but the learned Magistrate failed to award the same citing that had the plaintiff not obtained the grant he couldn't have had capacity to institute this suit. The appellant urged this court to find that the expense was under special damages and it was specifically pleaded and proved.
17. The appellant also sought for costs both for the lower court and this court in accordance with **S.27 of the Civil Procedure Act**. The appellant tabulated his claim as follows; Pain and suffering Kshs. 20,000, Loss of expectation of life Kshs. 120,000, loss of dependency Kshs. 2,464,000, special damages Kshs. 25,000 all amounting to Kshs. 2,604,000 and submitted that the appeal is merited and the above limbs ought to have been awarded as the appellant made a case for them in the trail court.
18. The appellant submitted that he has proved the appeal to the required standards and prays that the Court assesses judgement on loss of dependency and special damages as tabulated above.

ANALYSIS AND DETERMINATION

19. I have perused through the entire record of appeal and considered the filed submissions. There is only one issue for determination in this suit namely;

Whether the trial courts award on quantum should be disturbed.

20. This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

21. On quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court. Being a discretionary matter, it is now well settled that an appellate court would rarely interfere and can only do so following the principles laid out in the case of **Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -Vs- Aziri Kamau Musika Lubia & Another (Nbi C.A No. 21 Of 1984)** where the Court of Appeal made the following guiding observations;

“The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must have been a wholly erroneous estimate of the damages.”

22. The above decision was in my view premised on the fact that damages must be commensurate with injuries and should not appear like it is greater or conferring a benefit to a party over the injuries suffered.

23. Similarly, the court in **Amos Wenyere & another v Ashford Muriithi Muregi & 2 others [2017] eKLR** stated ***“It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position he/she was prior to the accident”.***

24. Basically, the appellant faults the trial court for not awarding anything for loss of dependency and special damages. The trial court's reason as to why it did not award on the limb of loss of dependency was because the plaintiff being a brother to the deceased did not prove dependency on the deceased.

25. Under **Section (4) (1) of the Fatal Accidents Act**, it is clear who is a dependant for whose benefit a claim under the said Act can be brought. It provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

26. Actions brought under the Law Reform Act are for the benefit of the estate while actions under the Fatal Accidents Act are for the benefit of the dependents and not for the estate. From the section above it is evident that an action under the Fatal Accident's Act can be brought by an executor/administrator on behalf of a child.

27. In **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] eKLR** the court held that;

“ Indeed, it is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependant on a deceased prior to his death.”

28. The plaintiff was a brother to the deceased, he is therefore not permitted to obtain the benefits from the deceased estate personally. He may only sue as an administrator of the estate of the deceased. He produced limited grant dated the 1st of May 2009 in which he proved he

has authority and locus to file suit.

29. The appellant stated in his submissions that the deceased was a single mother with one child, a birth certificate was produced in evidence to confirm that indeed the child was the deceased's. However, no evidence was adduced to show how the plaintiff who was the deceased's brother depended on the deceased. Therefore, the trial court should have considered the fact that there was a minor in whose benefit the proceedings were brought and award damages under the head of loss of dependency. Since the deceased was a single mother, it was thus reasonable to conclude that the child solely depended on her.

30. Further the court in **Pleasant View School Limited v Rose Mutheu Kithoi & another** (supra) proceeded to state that;

“Appreciably, it is reasonable to expect that as an African man, the deceased financially supported the 1st Respondent, his Co-Wife, their seven (7) children and mother. His brothers and sisters ought to have demonstrated how he supported them. In the absence of any evidence, this court agreed with the Appellant's submissions that the 2nd Respondent, the deceased's brothers and sister were not entitled to his deceased's estate and that in any event, the Section 4(2) of the Fatal Accident's Act was clear that the action under the said Act could not have been brought for their benefit.”

31. In **Mary Nabwire Omalla v David Wachira & 2 Others NBI HCCC No. 605 of 2009 [2011] eKLR**, Rawal J. stated that;

“I do agree that the dependants/beneficiaries under the [Fatal Accidents] Act are specified under Sec. 4 (1) of the said Act. Thus, I shall not consider the sisters and brothers of the deceased as the dependants of the estate.”

32. Having found that this suit was only filed for the benefit of the child and that there was indeed prove that the child belonged to the deceased person, then I would award under the limb of loss of dependency as follows;

33. Since the deceased died at the age of 30 years this court would adopt a multiplier of 25 years and a multiplicand of Kshs. 3043 as per the **Regulation of Wages (General) (Amendment) of 2009** because the deceased employment and earning was not proved.

34. Though currently retirement age for civil servants is begged at 60 years, at private sector given the vicissitudes of life, and periodic economic upheavals it is rather too much to expect one to retire age of 60 years and I am persuaded by authority of **Kenya Power & Lighting Co.Ltd. –versus- Bernard Kilonzo** (suing as the administrator of the Estate of the late **Maurice Mutinda Kilonzo (deceased) [2012] eKLR** where the court adopted a multiplier of 25 years where the deceased died at 21 years old. This court finds that on the basis of the above a multiplier of 25 years would have been fair and appropriate.

35. On the question of dependency ratio, I am persuaded that the deceased used 2/3 of her earnings to support her only child and the same should be sufficient in the circumstances.

36. On the issue of special damages, the appellant had pleaded Kshs. 25,000 and they produced a receipt showing filing fees of the letters of administration of Kshs. 25,000.

37. In **Kenya Power & Lighting Company Ltd v James Muli Kyalo & another [2020] eKLR** the court held 66 that;

“It is trite law that a claim for special damages must not only be pleaded, it must also be strictly proved. This is because a claim for special damages represents what the party may have actually lost in the form of the amount used and he would want to be put back to the position he was had he not been forced to incur the expense, hence the need to strictly prove these claims.”

38. I am therefore inclined to award Kshs. 25,000 for special damages since the same was pleaded and proved.

39. Flowing from the conclusions on each of heads under general damages above, the awards are as follow;

(a) Pain and suffering	Kshs. 20,000
(b) Loss of expectation of life	Kshs. 120,000
(c) Loss of dependency	Kshs. 3,043 x25x12x2/3=608,600
(d) Specials	Kshs. 25,000
Total	Kshs. 773,600

CONCLUSION

40. The trial court's judgment and decree dated 15th May, 2013 is hereby set aside and judgement be entered for the appellant in the sum of **Kshs. 773,600** with interest from the date of the judgment of the trial court. The appellant shall also have costs of the appeal.

41. In view of the fact that the deceased son **DERICK KORICHO** must have attained the age of majority by now the above sums of money must be invested and or transmitted to him and or utilized on his behalf and the appellant be accountable over the same.

Dated signed and delivered at Nakuru via video link this 15th day of July 2021.

H. K. CHEMITEI

JUDGE