



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO.47 OF 2019

ALICE MWARANIA MUTHEE

(Suing as the Administrator of the

Estate of FRANCIS NYAMU MUNYIRI(Deceased).....APPELLANT

VERSUS

PAUL KABUGI MAINA.....RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment of Hon. F.W.Macharia (SPM) delivered on 26/07/2018 in Karatina SPMCC No.90 of 2018; the appellants claim arose from a road traffic accident along Kiamachimbi-Ruthagati Road at Ndemu Area; the deceased was a lawful pedal cyclist along the above road when the respondent so negligently drove, managed and controlled motor vehicle registration number KBX 129T and consequently knocking down and occasioning fatal injuries to the deceased;

2. The appellants claim was for special and general damages under the Law Reform Act and the Fatal Accident Act; the trial court found the appellant liable and made the following award;

- Liability: 90:10 in favour of the appellant
- General damages for pain and suffering – Kshs.50,000/=
- Loss of expectation of life – Kshs.100,000/=
- Special Damages - Kshs.67,125/=
- Loss of dependency – Kshs.592,720/=

3. Being dissatisfied with the judgment of the trial Court, the appellant filed this instant appeal and listed the following grounds of appeal as are summarized hereunder;-

- (i) The trial court erred in finding that the dependency ratio of 1/3 was applicable against the weight of the evidence tendered;
- (ii) The trial court erred in finding the minimum wage is Kshs.7,409/- against the evidence tendered;
- (iii) The trial court disregarded and failed to take into account credible and reliable evidence and submissions by the appellant;
- (iv) The trial court arrived at an erroneous computation of damages which is a miscarriage of justice.

4. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of the rival submissions;

APPELLANTS SUBMISSIONS

5. The appellants case was that the deceased was survived by a wife and 6 (six) children one of whom was still a student; she submitted that there was need for clarification on the dependency ratio used by the trial court in making the final award; there was no denial of the

deceased's earnings in the sum of Kshs.12,000/- yet the trial court instead used the minimum wage as a multiplicand;

6. The appellant prayed for the appeal to be allowed with the judgment be set aside; the proper dependency ratio and multiplicand be applied and the award be varied; and the costs be awarded to the appellant.

RESPONDENTS SUBMISSIONS

7. In response the respondent submitted that the award was fair and reasonable; the trial correctly adopted the multiplicand of Kshs.7,409/- and the ratio of 1/3 and gave its reasons for adopting the same; since the deceased was a watchman at the time of his demise and there was no evidence produced to prove the deceased's earnings the trial court therefore correctly applied the minimum wage of Kshs.7,409/-;

8. The respondent's contention is that in light of the evidence adduced by the appellant the trial courts determination was not erroneous and that the appellant had failed to meet the threshold for overturning the trial courts judgment and prayed for the appeal to be dismissed.

ISSUES FOR DETERMINATION

9. After having read the written submissions filed by both parties and having perused the Record of Appeal this court has framed the following issues for determination; and the issues are as set out hereunder;

(i) Whether the trial court adopted the correct dependency ratio;

(ii) Whether the trial court adopted the correct multiplicand;

(iii) Costs of the appeal.

ANALYSIS

10. It is important that to state that the principles to be considered when reviewing an Appeal on damages are laid out in the Court of Appeal case of ***Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR***; this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely 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...'

11. Similarly, in the case of ***Loice Wanjiku Kagunda vs. Julius Gachau Mwangi*** CA 142/2003 the Court of Appeal held that: -

'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).'

Whether the trial court adopted the correct dependency ratio

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

13. The appellant in her pleadings set out the dependants of the deceased as follows;

(i) Alice MwaraniaMuthee – widow

(ii) Jacinta WanguiKabachia – daughter – aged 39 years

(iii) James NdirituNyamu – son –aged 35 years

(iv) Joel NdirituNyamu – son –aged 32 years

(iv) Lucy WanjiraNyamu-daughter – aged 30 years

(v) Simon Gatia Nyamu – son –aged 26 years

(v) Richard Mwangi Nyamu – son –aged 22 years

14. Her evidence was that deceased was a farmer and also worked as a watchman and that he would give her Kshs.15,000/- as money to take care of the household needs; that the deceased had jobless children and paid school fees for his son who was in secondary school;

15. Upon careful perusal of the judgment on the court record this court finds that it is devoid of any reasons given by the trial court as to how it arrived at and adopted the ratio utilized; but using the total arrived at by the trial court as set out in its judgment for '**Loss of dependency = Kshs.592,720**' it becomes apparent that the calculation were based on a dependency ratio of 2/3; and upon comparison of the decree with the judgment it is apparent that there is confusion as to the ratio utilized by the trial court; in the absence of any narrative and a finding by the trial court, therefore, as submitted by the appellant there is need for clarity on the correct dependency ratio to be adopted;

16. In this instance it is not disputed that the deceased was married and had six children who were all adults save for the last born who was in Form Four at the time of the deceased's passing; however, dependency cannot be assumed where there are adult children and this court reiterates that it is imperative that evidence is tendered in support thereof;

17. The appellant did not provide any evidence to prove the school fees paid for the youngest child neither did she provide any evidence on the support given to the jobless children who were all adults; ordinarily school and university going children normally use up a large portion of their parents income and in this instance in the absence of any evidence of such expenditure it would not be unreasonable to expect that the deceased herein used a smaller portion of his income to support his family and the larger portion was spent on himself;

18. In the circumstances this court is satisfied that a dependency ratio of 1/3 is reasonable and the ratio of 2/3 adopted by the trial court in its judgment was based on wrong principles and therefore warrants interference;

Whether the trial court adopted the correct multiplicand:

19. In evidence the appellant stated that the deceased was employed and earned a salary of Kshs.7,500/- per month from his employment and as a farmer earned Kshs.15,000/- from agriculture which translates to a total of Kshs.22,500/-; the trial court found that '**There was no proof of the income generated**' and to state the multiplicand would be based on the minimum wage for unskilled workers; again the figure that appears on the calculations is Kshs.7,409/- but the judgment is devoid of any narrative as to how the trial court derived this figure;

20. In the given circumstances this court will proceed to re-assess the multiplicand; the deceased was employed as a security guard and at the time of his demise the minimum wage at that time for a security guard was Kshs.10,107/- and this court satisfied that this figure is reasonable and finds that there is need to interfere with the trial courts figure as it has no narrative or basis;

21. The deceased was aged 56 years at the time of his demise and would probably have retired at age 60; as there was no challenge raised by the respondent on the multiplier of 10 years this court finds no good reason to interfere with the trial courts finding on the multiplier and will proceed to adopt and uphold it.

FINDINGS AND DETERMINATION

22. For the forgoing reasons this court makes the following findings and determinations;

- (i) The appeal is found to be partially meritorious and it is hereby allowed;
- (ii) The dependency ratio of 2/3 is hereby set aside and substituted with a dependency ratio of 1/3;
- (iii) The judgment of the trial court is hereby set aside and substituted with a judgment in favour of the plaintiff as follows;

· Liability at a ratio of 90;10 in favor of the plaintiff

General damages

· Pain and suffering – Kshs.50,000/-

· Loss of expectation of life – Kshs.100,000/-

· Loss of dependency - Kshs.10,107/- x 12 x 10 x 1/3 =

Kshs.404,280/-

SUB - TOTAL –KSHS.554,280/-

· Less 10% =Kshs.498,852/=

· **Special damages** – Kshs.67,125/-

TOTAL – KSHS.565,977/-

· Costs of the suit and interest from the date of delivery of the judgment to be borne by the defendant. therein;

- (iv) Each party shall bear their own costs of the appeal.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 8TH DAY OF SEPTEMBER,2021

HON.A.MSHILA

JUDGE