



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO.15 OF 2015

REUBEN NDUNGU MUGIRO.....1ST APPELLANT

MOHAMMED ABDUL KARIM.....2ND APPELLANT

-VERSUS-

SAMUEL GITONGA KIRAGU

(Suing as the legal representatives and administrator of the estate of the late

AGATHA GICHUKI NAMU (DECEASED).....RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment of Hon. S.K. Mutai (SRM) delivered on the 10/03/2015 in Embu CMCC No.2 of 2014. The Respondent as guardian ad litem had instituted proceedings against the appellants for damages following the death of Agatha Gichuki Namu which arose from a road traffic accident that occurred on 13/07/2013 along the Embu – Kiritiri Road, opposite Oil Lybia Petrol Station involving the deceased and Motor Vehicle Registration Number KBU 303J belonging to the Appellants.

2. The matter went to full trial and judgment was entered in favour of the Respondent as follows:-

- (i) Liability – The Appellants were found 100% liable;
- (ii) Pain and suffering – Kshs.100,000/=;
- (iii) Loss of expectation of life – Kshs.200,000/=; and
- (iv) General damages – Kshs.1,440,000/=.

3. The Appellants being aggrieved by the decision of the trial court, lodged this appeal and listed six (6) grounds of appeal in their Memorandum of Appeal; the grounds of appeal are summarized as follows:-

- (i) The trial magistrate erred in law and in fact in awarding an excessive amount of Kshs.1,440,000/- which was not commensurate to the claim nor was it proved;**
- (ii) The trial court made wrong conclusions and deductions pertaining to the general damages awardable in this instance;**
- (iii) The trial court failed to analyze the evidence and the law and arrived at a wrong conclusion and deduction as pertains to general damages awardable; it failed to appreciate that the deceased had very few dependants as her last born daughter was already married therefore the dependency ratio was low and thereby arrived at a wrong decision;**
- (iv) The trial court failed to look at the tot misapprehended the facts of the case leading to an erroneous application of the law;**
- (v) The trial court failed to look at the totality of the pleadings and evidence in particular that the deceased was aged 51 years at the time of her demise and had no consistent means of income; and**

(vi) **The trial court misapprehended the facts of the case leading to an erroneous application of the facts into law.**

4. The parties were directed to canvass the appeal by filing and exchanging written submissions. Which are as summarized hereunder;

THE APPELLANTS' CASE:

5. The appellants relied on the following cases **Catholic Diocese of Kisumu vs Sophia Achieng Tete CA No. 284 of 20012KLR 55 and Jane Chelagat Bor vs Andrew Atieno Onduu (1988-92) 2KAR 288; 1990 -1994 EA 47.** Which cases set out the principles upon which an Appellate court can interfere with an award for damages;

6. The Appellants submit that prior to her demise the deceased was aged 51 years and her dependants were all over 18 years of age. Her two daughters were married with children of their own. The appellants further submitted that the Respondent did not prove the deceased's income and evidence was led that she was a farmer with an income of Kshs.20,000/- Since there was no proof of income the Regulation of Wages (General Amendment) Order 2015 ought to have been applied. Pursuant to this order the deceased would fall under the category of unskilled workers whose minimum wage would be Kshs.9,500/-the learned magistrate therefore erred in applying a multiplicand of Kshs.20,000/-.

7. The appellants submitted that the entire judgment was inordinately high and urged the court to allow the appeal by setting aside the judgment and assessing the award downwards; they also prayed to be awarded costs of the appeal.

RESPONDENT'S CASE

8. The respondent submitted that the award for damages was reasonable and not excessive and to buttress his case relied on the case of **Charles Oriwo Odeyo vs Apollo Justus Andabwa & Another (2017) eKLR** where the court set down conditions upon which an Appellate court could interfere with an award of the trial court. The respondent contends that the Appellants have not met this threshold;

9. He argued that he had proved his case on a balance of probabilities whereas the Appellants did not call any witnesses nor did they file any written submissions.

10. On the award for pain and suffering the respondent relied on the case of **Sukari Industries Limited vs Clyde Machimbo Juma Homabay HCCA No.68 of 2015 (2016) eKLR;** he submitted that the amount awarded of Kshs.100,000/- was reasonable and within the range of previously decided cases;

11. On the issue of earnings it was his contention that although he had not produced documentary evidence to support the income of Kshs.20,000/- this did not mean that the deceased was not earning an income; he relied on the case of **Nelson Rintari vs CMC Group Ltd (2015) eKLR;** Further he submitted that at the trial the Appellants did not controvert the evidence adduced on the income the deceased used to earn neither did they disprove that the deceased had a consistent source of income.

12. As for the dependants the Respondent submitted that he had produced a Chief's letter to corroborate this fact; his claim was for damages under the Fatal Accidents Act and the Law Reform Act; That contention was that the dependency ratio and the multiplicand applicable was a question of fact and further the age and marital status of a dependant cannot be used as a determinant of the dependency ratio;

13. The Respondent urged this court not to disturb the award of general damages under the head of loss of dependency, as the same was proper and correct. That the honourable court upholds the trial court's decision thereby dismissing the appeal with costs to the respondent.

ISSUES FOR DETERMINATION

14. Upon reading the rival written submissions this court has framed the following issues for determination:-

- (i) Whether the award for pain and suffering and loss of expectation of life was inordinately high;
- (ii) Whether the trial court erred in using the multiplicand of Kshs.20,000/-;
- (iii) Whether the respondent proved loss of dependency;
- (iv) Whether the trial courts assessment of damages was fair.

ANALYSIS

15. This is an appeal only on the issue of quantum, thus *while reviewing the trial Court's decision* this Court is guided by the principles set down in the case of **Butt vs Khan, [1981] eKLR 349** wherein it was stated;

“An appellate court will not disturb an award of 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 a figure which was either inordinately high or low.”

Whether the award for pain and suffering and loss of expectation of life was inordinately high;

16. The Respondent submitted that the amount awarded of Kshs.100,000/- for loss of expectation of life was reasonable and within the range of previously decided cases. The Respondent relied on the case of **Sukari Industries Limited vs Clyde Machimbo Juma Homabay HCCA No.68 of 2015 (2016) eKLR**; whereas the appellants proposed a sum of Kshs.50,000/- as damages under this head;

17. The generally accepted principle for the two heads of damages is that a nominal amount be awarded under this head if the death occurred immediately after the accident and a higher amount be awarded if the pain and suffering is prolonged after the accident, before death;

18. The conventional sum awarded for pain and suffering ranges from Kshs.10,000/- to Kshs.100,000/-, in this instance the trial court awarded the sum of Kshs.100,000/- which in the circumstances of the case is found to be reasonable as it is within the parameters of the comparative awards and does not warrant interference by this court.

19. As for loss of expectation of life the conventional sum is Kshs.100,000/-. in this instance the trial court awarded the sum of Kshs.200,000/-; this court finds that there is good reason to interfere with this award and reiterates that the conventional award within the parameters of other comparative awards is in the sum of Kshs.100,000/- and this sum is found to be reasonable; case law relied on **Irene W. Kagundu & Anor vs W.K.Tilley (Muthaiga) Ltd HCCC No.252 of 2002 (NKU)(Unreported)**;

20. This ground of appeal is found to be partially meritorious.

Whether the trial court erred in using the multiplicand of Kshs.20,000/-

21. **On the multiplicand**; the deceased is said to have been a farmer with an income of Kshs.20,000/= but according to the Appellants the Respondent did not produce any documentary evidence at trial to prove this fact; the Appellants contend that the trial court erred in adopting the above sum as a multiplicand in the absence of documentary evidence;

22. The Court of Appeal dealt with this issue of documentary evidence being the only way to prove a deceased's income in the case of **Jacob Ayiga Maruja & Anor vs Simeon Obayo (2005)eKLR**; the Court held as follows;

'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 of proving earnings is equally the production of documents. That kind of stand 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.'

23. This court is guided by the above authority that documentary evidence should not be the only determinant in establishing whether a deceased earned or had a source of income; as there was nothing to substantiate the amount of the deceased's monthly income the trial court ought to have applied **The Regulation Of Wages (Agricultural Industry) (Amendment) Order 2015**; the cadre of employment the respondent assigned to the deceased was a farmer, the gazetted wage for farmers in the year was Kshs.5,844/-. In the circumstances this amount is found to be a reasonable multiplicand.

24. This court finds good reason to warrant interfering with the trial court's assessment of the multiplicand and is satisfied that the trial magistrate misapprehend the facts and evidence on record and proceeded on wrong principles in using a multiplicand of Kshs.20,000/- instead of Kshs5,844/=-; This court finds that the figure used did not represent a fair amount and thus arrived at an aggravated award.

25. The deceased was aged 51 years of age and was in good health and nothing was stated to show that she suffered from any illness. Taking into account the government retirement age of 60 years the multiplier applied by the trial magistrate was nine (9) years is found by this court to be acceptable for calculating loss of dependency and it finds no reason to disturb the same.

26. The upshot is that this ground of appeal is found to be partially meritorious;

Whether the respondent proved loss of dependency:

27. The Respondent in his Complaint dated 18/12/2013 lists the deceased's dependants as follows:-

- a) Samuel Gitonga Kirago - son
- b) James Muriithi Kirago - son
- c) Irene Ngendo Kirago - daughter
- d) Consolata Wawira Kirago - daughter

28. The Appellants contend that the respondent did not prove dependency and according to them the deceased dependants were all over 18 years of age and amongst them were her two daughters who were married with children of their own; whereas the respondent argues that the age or marital status cannot be used to determine the dependency;

29. The applicable law is found at Section 4(1) of the Fatal Accidents Act which section describes who a dependant for whose benefit a claim under the Act may be brought; and it reads 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 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 proportional 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.’

30. There is no dispute that the Respondent was a son to the deceased and accordingly either he or any of his siblings were entitled to commence these proceedings under the Fatal Accidents Act. However this does not mean that any of these parties are automatically entitled to damages as dependency is a matter of fact and must be proved. The Respondent and his siblings must demonstrate that they were dependant on the deceased prior to her death. The case law relied on that enunciates the principle of proof of dependency is **Hussein Ahmed Hamshi & Anor vs Peter Guchuru Njoroge [2016] eKLR where the court held:**

‘...dependency is a matter of fact. The trial court having received evidence that the deceased would give the dependants Kshs.10,000/- per month, to this court it was not open to the court that another sum be ascertained and subjected to a dependency ratio. To leave the known sum and venture elsewhere would be with due respect to the trial court to engage in undue speculation.’

31. The record reflects that the Respondent placed nothing before the trial court to demonstrate that the his siblings together with himself were dependant on the deceased, During cross-examination he gave his age as 30 years and stated that their last born was aged over 18 years. It was therefore incumbent upon the Respondent to have led evidence to demonstrate the amount of money the deceased used to send or spend on him or his siblings as a monthly sustenance as proof of dependency on the deceased.

32. In the absence of such evidence this court finds that the Respondent failed to prove dependency on the deceased prior to her death.

33. This ground of Appeal is found to have merit and it is allowed.

Whether the trial courts assessment of damages was fair.

34. The three things to consider when calculating loss of dependency are the net earning power of the deceased, the age and expectation of the working life of the deceased and lastly the proportion of income that the deceased would have made available to the dependants. The case law relied on is the case of **Hayes vs Patel (1961) EA 129; cited with authority in Vincent Sululu & Another vs Rose Wanjiru [2016] eKLR** which sets out the three determinants and stated as follows;

‘The court should find the age and expectation of the working life of the deceased and consider the ages and expectation of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants.’

35. The age of the deceased is not disputed and the multiplier of nine (9) years was found to be acceptable; the multiplicand of Kshs.20,000/- was reduced by this court after it made a finding that the minimum wage of Kshs.5,844/- On the issue of the dependency ratio the trial court made a determination of 2/3 but this court finds no basis for the same as the Respondent failed to prove dependency;

36. This court is satisfied that the trial magistrate misapprehended the facts and evidence on record and proceeded on wrong principles and thus arrived at an aggravated award of Kshs.1,440,000/- which did not represent a fair assessment of damages as no award was sustainable under loss of dependency.

37. This ground of appeal is found to be with merit and it is hereby allowed.

FINDINGS AND DETERMINATION

38. For the forgoing reasons the appeal is found to be partially successful and this court makes the following determination;

- (i) The trial court’s decision on liability is hereby upheld;
- (ii) The award made for pain and suffering is hereby upheld;
- (iii) The award made for loss of expectation of life is set aside and substituted with the sum of Kshs.100,000/-;
- (iv) The award made for loss of dependency is hereby set aside and substituted with a dismissal as the respondent failed to prove this claim to the desired threshold;
- (v) The respondent shall be entitled to costs in the lower court; but on Appeal, each party shall bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 13TH DAY OF SEPTEMBER, 2021.

HON.A.MSHILA

JUDGE