



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

CIVIL APPEAL NO. 8 OF 2021

(CORAM: F.M. GIKONYO J.)

(Appeal from the judgment of Hon. R.M. Oanda P. M) Delivered on 22.2.2018

in Kilgoris PMCC No. 4 of 2017)

MIRIAM MORAA.....APPELLANT

VERSUS

JOO & LNO (Suing as the legal representative of the estate of VNO).....RESPONDENT

JUDGMENT

Appeal on Damages

[1]. This appeal is on quantum of damages in the judgment KILGORIS SPMC Civil Suit No. 4 of 2017 delivered on the 22nd February 2018 in the following terms: -

a) Apportioned liability in the ratio of 80: 20 in favour of the plaintiff against the defendant as per the consent recorded on 14/12/17.

b) Awarded General damages

c) Under Fatal Accidents Act.

i. Loss of dependency 10,000 x 30x 12 x2/3 Kshs. 2,400,000/=

d) Under Law Reform Act

i. Loss of expectation of life Kshs. 100,000/=

ii. Pain and suffering Kshs. 50,000/=

e) Less under Law Reform Act Kshs. 110,000/=

TOTAL Kshs. 2,400,000/=

f) Special damages Kshs. 111,800/=

TOTAL Kshs. 2,510,000/=

g) less 20% (Kshs. 502,360) Kshs 2,510,000/=

h) plus cost and interest

[2]. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 19th March 2018 in which they cited seven (7) grounds of appeal but all of which relate to one issue; quantum of damages.

APPELLANT'S CASE

[3]. The Appellant did not call any witnesses in the trial.

[4]. In her submissions in support of the appeal, the appellant urged the court to re- evaluate the evidence on record.

[5]. The appellant submitted that it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. The discretion in assessing the amount of general damages payable will be disturbed if the trial court; took into account an irrelevant factor or, left out of account a relevant factor or, the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. She relied in the case of **Kanga V Manyoka [1961] EA 705,709, 713 & Lukenya Ranching and Farming Coop Society Ltd V Kavoloto [1979] EA.**

[6]. The appellant submitted that according to the plaint, the suit was filed by the plaintiffs as administrators of the estate of the deceased. The first plaintiff's relation to the deceased was not disclosed. The second plaintiff was listed as the wife and dependant to the deceased. The plaintiffs prayed for damages under Fatal Accident Act and Law Reform Act. PW1 claimed that they were married when the deceased was 15 years. That was below the minimum age provided by the Marriage Act. Contends that the marriage between the deceased and PW1 was void and as such did not exist. Her reasons were based on the fact that the deceased died at the age of 18 years and PW1 claimed they were married when he was 15 years old. She relied on the provisions of Section 4 of the Marriage Act 2014. They cited the case of **Council of Imams and Preachers of Kenya, Malindi & 4 Others V Attorney General & 5 others [2015] eKLR.**

[7]. The appellant submitted that with the marriage between the deceased and the second respondent having been illegal, the respondent should not benefit from such illegality. She cited the case of **D. Njogu & Company Advocates Vs National Bank Of Kenya Limited [2006] and Lti Kisii Safari Inns Ltd & 2 Others V Deutseche Investitions Und Entwicklungsgellschaft ('Deg) & others [2011] eKLR.**

[8]. The appellant submitted that Section 8 of the Fatal Accidents Act requires the plaintiff to provide full particulars. She contends that such particulars were not availed in any document filed in court, nor in the plaintiff's evidence. The relationship between the deceased and the first plaintiff was not established. The ages of the minors were also not established. The plaintiffs only threw names to the court.

[9]. The appellant submitted that dependency is a question of fact and the same must be proved by the person alleging. It must be demonstrated that the persons whose benefits the proceedings are brought under the Fatal Accidents Act were dependants on the deceased prior to his death. The appellant contends that the second respondent testified that she had been married with children. The ages or class attended by the children were not indicated. As such the appellant submitted that the respondents did not prove dependency and as such they were not entitled to the award of loss of dependency. She cited the case of **R NM V RMN [2017] eKLR.**

[10]. On the award on loss of dependency, the appellant submitted that the trial court completely misapplied the law and the principles applicable in arriving at the award of Kshs, 2,400,000/=. The trial court adopted a multiplier of 30 years using a multiplicand of Kshs. 10,000 being alleged as the basic salary of the deceased and worked out the loss of expectation of life thereof. There was no proof of the alleged earnings. She cited the case of **Kwanzia V Ngalali Mutual & Another , Oyugi Judith & Another V Fredrick Odhiambo Ongon & 3 Others [2014] eKLR, Ann Kanja Kithinji (Suing As The Legal Representative Of The Estate Of Patrick Koome (Deceased) & 2 Others V Jacob Kirari & Another [2018] Eklr, Delina General Enterprises Limited V M K N [2017] eKLR, Nyari Focus Self Help Group V Monica Njeri Kimani (Suing As The Legal Administrator Of The Estate Of The Late Nancy Wairimu([2018] eKLR, Daniel Mwangi Rugano V Julis G Macharia (Suing As The Legal Representatives Of The Estate Of Humphrey Maina Macharia [2018] eKLR.** the appellant submitted that a global award of Kshs. 750,000.00 would be a reasonable award for loss of dependency in consideration of vicissitudes & vagrancies of life.

[11]. On costs of the appeal, the appellant urged the court to be guided by Section 27(1) of the Civil Procedure Act costs should follow the event.

[12]. The appellant urged this court to set aside the judgment of the trial court herein and re assess the quantum based on their submissions herein. She prayed that the appeal be allowed and the appellant be awarded costs of this appeal.

RESPONDENT'S CASE

[13]. During trial, the Respondent called one witnesses in support of her case. **PW1-** LN. She testified that she was a farmer living at Nyamache. The deceased was her husband. He was involved in a traffic accident on 09/03/2016 at Poroko area. He was a motorcyclist and the vehicle hit him. He succumbed to the injuries. She produced the death certificate as **P Exh. 1**, letters of administration as **P Exh 2** and paid her advocate for the services Kshs. 20,000.00. The receipt was produced as **P Exh 3**. The accident was reported at Kilgoris police station and was issued with a police abstract report **P Exh 4**. They had 2 children with the deceased, DB and HN. The letter from chief dated 23/3/2016 was produced as **P Exh 5**. She produced a bundle of receipts which were marked as **P Exh 6**. The deceased died at Kilgoris hospital. The post mortem report was marked as **P Exh.7**. The deceased was a boda boda rider earning about Kshs. 15,000/= per month. The deceased's children were in an academy school. The deceased used to take care of them.

[14]. On cross examination, she testified that she was only informed of the accident. She had been married to the deceased for three years. He was 18 years old at the time of death. They had two children. She had been married with the children. The children attended [Particulars Withheld] academy. The driver was charged in court.

[15]. The respondent submitted that the trial magistrate should not be faulted for finding that the deceased's wife and children were fully

dependent on him and adopted a dependency ratio of 2/3. therefore the trial magistrate applied the right principles of law to the facts of the case before him. The trial magistrate took into consideration the correct principles of law in awarding a sum of Kshs. 2,400,000/= as loss of dependency and therefore the amount awarded was not excessive in the circumstances. They cited comparable jurisprudence in the case of *YN Wholesalers Ltd & Another V Joseph Kimani Kamau & Another [2017] eKLR And Kisii Civil Appeal No. 17 Of 2016 Nicholas Nyagwenchi Miyongo Josep V James Nyakundi Nyamari & 2 Others [2019] eKLR.*

[16]. The respondent submitted that the admission of the respondent that the children mentioned were not the deceased's biological children does not in any way negate and or rebut the fact that the children were being taken care of by the deceased immediately prior to his death and he accepted them as his own when marrying the respondent. Therefore, the appellant is estopped from claiming that the deceased died leaving no beneficiaries behind. They cited the case of *Kisumu Civil Appeal No. 61 Of 2007 Richard Omeyo Omino V Christine A. Onyango [2009] eKLR.*

[17]. The respondent submitted that Section 4 of the Fatal Accidents Act does not specifically say that for the children to benefit as dependants they must be biological children of the deceased. They contend that the respondent and the children were dependants of the deceased within the meaning of Section 4 of the Fatal Accident Act and hence the trial magistrate did not err in adopting a multiplicand of 2/3 after finding that the respondent and her children were wholly dependent on the deceased.

[18]. In conclusion, the respondent prayed that the appeal be dismissed as it lacks merit.

[19]. Directions were given that the appeal be disposed of by way of written submissions. The appellant and the respondent filed their respective written submissions, which I have read through and noted the arguments advanced.

ANALYSIS AND DETERMINATION

Duty of court

[20]. Under Section 78(2) of the Civil Procedure Act, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.

[21]. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor -Vs- Associate Motor Boat Co. Ltd 1968 EA 123.*

Issues

[22]. This appeal is on quantum of damages only. Thus, the issue at hand is whether the trial court erred in making the award of damages herein.

[23]. As assessment of damages is at the discretion of the trial court, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another* as follows: -

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

[24]. No challenge was made on the award of the Ksh.100, 000/- for loss of expectation of life and pain and suffering at Ksh.20, 000/- for the death which it was conceded occurred shortly after the accident. I uphold these awards.

[25]. Quarrel is on the award on the dependency ratio and the proof of earnings.

Damages under the Fatal Accidents Act

Dependency: formula for calculation

[26]. The formula for dependency, is the multiplicand, that is, the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on his dependants. see *Beatrice Wangui Thairu -Vs- Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 Of 1988* (UR)

Multiplicand

[27]. The Appellant submitted that there was no evidence that the deceased earned Kshs. 10,000/= per month. The Respondent on the other hand submitted that the deceased's wife testified that he earned 15,000/=. Other than the oral testimony of PW1, no evidence of proof of earnings of the deceased was provided. Some efforts towards this was necessary. However, I do not mean that only documentary evidence should prove earnings, for it is possible for one to hold a paid job or earn from an employment without formal documentation particularly in the informal sector and employment. See *Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR*

[28]. In this case, there was proof that the deceased was a *boda boda* rider and earned therefrom. This fact was not disputed. The respondent claimed that the deceased's monthly earnings was Kshs. 15,000. The appellants disputed this. But, the trial court adopted a sum of Kshs. 10,000/= per month. In light of the evidence adduced, the trial court was justified in adopting a reasonable pay for a motor cyclist at Kshs. 10,000 per month.

Multiplier and dependency ratio

[29]. The Appellant has not challenged the multiplier but was dissatisfied with the dependency ratio applied by the trial court. I have considered the opposing submissions in this respect. The Appellant argue that the dependency ratio of 2/3 was not proved.

[30]. The appellant argued that the marriage between the respondent and the deceased was illegal for not meeting the requirements of the Marriage Act and that the children do not biologically belong to the deceased. PW1 acknowledged that the children are not biological children of the deceased but the deceased acknowledged them as his children. The evidence produced by the respondents is that the deceased voluntarily took up responsibility, accepted the children as his own and was maintaining them immediately prior to his death. I do note also that the respondent and her children were listed as dependants in the letter by the chief. In law, children whom the deceased had taken into his family as his own, and were being maintained by him immediately prior to his death, are dependants of the deceased. Such dependency is not founded on any marriage (legal or illegal) between the deceased and the mother of the children. Again, it is not dependent upon the children being biological children of the deceased. I have also not found any material to suggest that the deceased was not applying two-thirds of his earnings towards his nascent family.

[31]. Consequently, I find no merit in the appeal and the same is dismissed.

[32]. Given the nature of arguments presented in the appeal, I order each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 4TH DAY OF OCTOBER, 2021

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F. GIKONYO M.

JUDGE

In the Presence of:-

1. Court Assistant – Kasaso
2. Kimondo Gichoka Counsel for Applicants - Absent
3. Ben Gichana Counsel for Respondent - Absent