



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 251 OF 2013

DOVE CHRISTIAN FELLOWSHIP.....APPELLANT

VERSUS

PHILIP MAKAU.....RESPONDENT

(Being an appeal from the Judgement and order of the Learned Senior Principal Magistrate, P.N Gesora Esq in Machakos Civil Suit No. 430 B of 2001 and dated 29.11.2013.)

PHILIP MAKAU.....PLAINTIFF

VERSUS

DANIEL MBITL.....DEFENDANT

DOVE CHRISTIAN FELLOWSHIP.....3RD PARTY

JUDGEMENT

1. The Respondent herein, **Philip Makau**, filed the suit against the Defendant seeking damages against the Defendant in respect of a road traffic accident which occurred on or about 15th March, 2000. On that day, it was pleaded that the deceased was travelling in motor vehicle registration no. KAD 177G along Machakos-Konza Road when by reason of the negligence on the part of the driver of the said vehicle it was involved in a road traffic accident in which the deceased sustained fatal injuries.
2. The Defendant entered appearance and filed the defence. However in the course of the proceedings, the parties agreed to have the Defendant discharged upon the admission by the 3rd Party that they were the owners of the said vehicle.
3. According to the Plaintiff, after the said accident, the deceased who was a fare paying passenger sustained severe injuries and was rushed to Machakos District Hospital and later to Kenyatta National Hospital where she succumbed. It was the plaintiff's evidence that the deceased was 48 years old at the time of the accident and was a cereals dealer who was earning Kshs 500-600 per day and approximately 15,000/- per month.
4. On behalf of the defence, one witness was called who stated that on the material date he was driving the said vehicle which was involved in an accident. According to him the accident was caused by the fact that he hit a pothole and lost control.
5. After hearing the parties, the trial court found that the 3rd party was wholly liable. On quantum the Court awarded Kshs 50,000/- for pain and suffering and Kshs 120,000/- for loss of expectation of life. In respect of earnings, the court found that there was no proof of the same and adopted the minimum wage at the time which was Kshs 6,000/- per month and applied a multiplier of 12 years. As regards funeral expense, the court awarded Kshs 50,000/-
6. In this appeal, the appellant challenges the awards for loss of earnings and funeral expenses and raises the following grounds:

1) That the learned magistrate erred both in law and in fact when he found that funeral expenses were awardable to the Respondent.

2) **The learned magistrate erred in law and in fact when he made a finding that the Respondent did not need to especially proof funeral expenses.**

3) **The learned magistrate erred in both law and in fact in when he applied that he applied the wrong parameters to award Kshs 864,000/= as lost earnings.**

4) **The learned magistrate erred both in law and in fact when he awarded a sum of Kshs 864,000/= without giving reasons thereof.**

7. It was submitted on behalf of the Appellant that the funeral expenses have been classified as special damages which must be specifically. According to the Appellant, though the Respondent pleaded for Kshs 5,100/= as the funeral expenses, there was no document to prove that indeed the same was actually spent. The court however went ahead and awarded Respondent Kshs 50,000/= contrary to the general rule that Special damages must be specifically pleaded. According to the Appellant, the award exceeded was actually pleaded. The Appellant relied on the case of **Wilson Chumo vs. Messrs Kapsimotwo Express (1992) eKLR.**

8. It was submitted that funeral expenses are special damages and they should be specifically pleaded and proved on a balance of probabilities.

9. According to the appellant, the pleaded funeral expenses of Kshs 5,190/=, were not proved and the Respondent admitted on the submissions that the same were not proved not awardable to the Respondent. It was therefore the Appellant's submission that the trial court erred in awarding the Respondent Kshs 50,000/= and prayed that the same be disallowed.

10. On loss of earning, it was submitted that under the **Law Reform Act** one of the awards payable is lost earnings which is a compensation for the years that the deceased would have worked to earn a living for him/her and the dependants. According to the Appellant, this award usually depends on the age and the salary/income of the deceased per month. In this case it was submitted that the Respondent put forward the fact that the deceased had a child and her parents who depended on her. However, there was no proof that she was maintaining her parents neither was there proof that she had a child. It was therefore submitted that the Respondent was not deserving of the award on the lost earnings as there was no dependants.

11. It was submitted that during the trial the Respondent stated that deceased was only 48 years and was a cereal vendor earning a monthly profit of Kshs15000/= however, there was no proof that the deceased earned such amount of money. However, the court in its decision stated that the deceased would have worked for more 12 years under the global convention salary which is assted at Kshs 6000/= a month. According to the Appellant, the Court did not consider the fact that there would have been circumstances which would have come along and the deceased might have died in one way or another or might have contracted a terminal illness which might have disabled her from working for the 12 years.

12. It was further submitted that the court also failed to consider that even though the deceased would be alive she would have spent half of her salary on herself and would have spent the rest on the dependants. According to the appellant, the Deceased was also not in the employed in the formal sector which caps the retirement age at 55 years of age. She was involved in the informal sector and would have chosen to retire at the age of 50 years or less taking into account the nature of the work she was involved in that required going to the market and spending more hours walking to look for the cereals.

13. It was submitted that the court should have considered the issues raised above and come up with the correct parameter in the award of lost earnings. According to the Appellant, the deceased would have worked for five years more and would have spent half of the salary on herself. Therefore, the court should have awarded the Respondent $6000 \times 5 \times 12 = \text{Kshs } 360,000/=$ in the event that the court was inclined to award the Respondent lost earnings.

14. This Court was therefore urged to consider the submissions made herein and the pleading and the facts and the evidence presented herein and make its own decision independent of the trial court's decision.

15. On behalf of the Respondent, it was submitted that Section 6 of the **Fatal Accidents Act**, recognizes that funeral expenses are payable and that the award by the trial court of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) was fair in the circumstances of this case since there is no dispute between the parties that there was a funeral following the deceased's death. In this regard, reliance was placed on **JNK (Suing as the legal representative of the Estate of KMM(Deceased) vs Chairman Board of Governors [...] Boys High School (2018) eKLR**, **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Ltd (2016)**, **Premier Dairy Limited -vs - Amrit Singh Sago & Another, C.A No. 312/2009**, **Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs. Dubai Super hardware [2021] eKLR** and **Jacob Ayiga Maruja & another -v- Simeon Obayo (2005) eKLR**.

16. It was therefore submitted that based on the foregoing funeral expenses indeed ought to have been awarded without strict prove and that Kshs. 50,000/- was a reasonable award under this head.

17. As regards the second issue of loss of earnings, it was submitted that the formula for assessment of loss was ably stated by **Ringera J**, in **Beatrice Wangui Thairu -vs- Hon. Ezekiel Bangetuny & Another Nairobi HCC No. 1638 of 1988 (UR)** and it was submitted that in this instant case, the deceased was in the informal employment and therefore had no documentation to prove her earnings. According to the Respondent, it is now trite law that it is not always that proof of income must be by production of documents as was held in **David Kimathi Kaburu -vs- Gerald Mworobia Murungi (Suing as legal representative of the estate of James Mwenda Mworobia (deceased) (2004) eKLR**.

18. According to the Respondent, P.W.1 testified before this court that the deceased was his younger sister and had a son called Mwanja Ndinda which fact was corroborated by P.W. 2. The deceased would also support her parents. It was submitted that oral evidence adduced

before court showed that the deceased person had dependents who relied on her as the bread winner. Contrary to the assertions by the Appellants, social realities is that there is not always documentation to show or prove that people support their parents or children but they do. Lack of documentation does not translate to the absence of dependents.

19. According to the Respondent, the lower court was correct to apply the Government Wages guidelines for the period, to arrive at some more reasonable earnings of Kenyan Shillings Six Thousand (Kshs. 6,000/-) which amount is not disputed by the Appellants in their written submissions as the Appellants seem to be only aggrieved by the multiplicand of 12 years. It was submitted that the multiplicand of 12 years as applied by the Lower Court was reasonable for reasons that the deceased person was in informal employment being a cereal vendor. Logic would dictate that to meet her basic needs she would have continued to work as long as she was healthy and capable and the Retirement Age of 55 years by then would not have hindered her to continue working.

20. It was therefore submitted that the Lower Court applied the correct parameters and the Respondent prayed that this Court does not disturb the award of the Lower Court and dismisses the Appeal with costs to the Respondents.

Determinations

21. I have considered the submissions made by the parties herein.

22. This appeal is only against the award of quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

23. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

24. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, held at page 248 that:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

25. Regarding funeral expenses, **Mbogoli Msagha, J** in **Humphrey Okuku Kwoba vs. Moses Muthee Nyambura & Another Busia HCCC No. 29 of 2002** held that:

“Although the plaintiff pleaded special damages amounting to Kshs 35,250/=, he only proved, by producing a receipt, that he paid Kshs 15,000/= legal fees. The standard fee for police accident abstract and the death certificate is Kshs 100/= and Kshs 250/= respectively and the production of the two documents is sufficient proof for such cost. It may not be easy to quantify funeral expenses since rarely would receipts be retained for some expenditure and therefore the Kshs 20,000/= claimed is modest enough to justify the award.”

26. I therefore agree with **G B M Kariuki, J, J** (as he then was) in **Mary Shesia Kivairu vs. Jeffa Enterprises Ltd & Another Kakamega HCCC NO. 17 of 2004**, where he awarded Kshs 30,000.00 as reasonable funeral expenses though the same was not proved but he was of the view that there was no doubt that expenses must have been incurred towards the funeral.

27. However, the law still remains that funeral expenses being special damages ought to be proved. To that extent **Wilson Chumo vs.**

Messrs Kapsimotwo Express (1992) eKLR where Muli JA stated that:

“Dealing first with the token of award of Kshs 5000/=for funeral expenses, these were not pleaded in the plaint and consequently they were not proved at the hearing. The learned trial judge called them special or reasonable funeral expenses. This was an error. There was no evidence to show that any funeral expenses were incurred. It was a gratuitous award without the basis...”

28. In the same case, Gicheru JA stated thus:

“On the question of special damages, it is trite law that the claim must be pleaded and proved. This was not done in relation to the funeral expenses and the amount awarded cannot be upheld.”

29. However, what amounts to strict proof depends on the circumstances of the case. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

30. It was therefore held by the Court of Appeal in Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 that:

“The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

31. Similarly, in Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

32. That was the position in Woodruff vs. Dupont [1964] EA 404 where it was held by the East African Court of Appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself”. The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

33. My understanding is that the court may perfectly award what is reasonable as funeral expenses. That position is supported by the decision in JNK (Suing as the legal representative of the Estate of the Estate of KMM(Deceased) vs Chairman Board of Governors [...] Boys High School (2018) eKLR where it was held that;

“In spite of lack of receipts this Court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

34. Similarly, in Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Ltd (2016) it was held that:

“...we are of course aware of the Court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.”

35. In Premier Dairy Limited -vs - Amrit Singh Sago & Another, C.A No. 312/2009, where the Court of Appeal took judicial notice of the fact that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved. Therefore, in Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs. Dubai Super hardware [2021] eKLR the court set aside the trial court’s Nil award on funeral expenses, and substituted the same with an award of Kshs. 50,000/= as funeral expenses.

36. I therefore agree that with hardships and difficulties faced by deceased’s mourning families, it has become necessary to allow, without strict proof, reasonable funeral expenses as was the case in Jacob Ayiga Maruja & another -v- Simeon Obayo (2005) eKLR, where the Court awarded Kshs 60,000/- towards funeral expenses saying;

“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses.”

37. However, where the amount spent is known the court can only award that. Where the parties plead what in their view was the amount spent in funeral, that is what the court ought to award. In this case, the Respondent pleaded Kshs 5,190/- as funeral expenses. Therefore, it was an error on the part of the learned trial magistrate to award more than the amount that was pleaded.

38. As for loss of dependency, the evidence was that the deceased was 48 years old earning Kshs 30,000.00per month. In **Albert Odawa vs. Gichimu Gichenji Nakuru HCCA No. 15 of 2003**, Koome, J (as she then was) expressed herself as hereunder:

“On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased’s earnings and thus the multiplicand of Kshs. 8,100.00 was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased’s income by applying the basic salary, which is paid to unskilled workers, and this would also have been difficult, as the age of the deceased was not stated. So the best option would have been to apply the global award. So an award of Kshs. 400,000.00 awarded.”

39. In my view, a global figure ought not to be resorted to merely because the Plaintiff has failed to prove the deceased’s pleaded earnings. Global awards is generally suitable in cases involving minor and adolescents whose income cannot be ascertain. However, in cases of adults who, it is alleged are earning, there ought to be proof of the same. However, as was held by Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR**:

“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 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

40. In **Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR** it was held that where income is not proved, the income of an unskilled worker ought to apply. According to the ***Regulation of Wages (General) (Amendment) Order, 2015*** the deceased would fall under the category of general workers whose minimum wage was be Kshs. 10,954.70.

41. Accordingly, I find that it was prudent for the trial court to adopt the minimum age as it did. In this case, here was evidence that the deceased had some dependants hence the award under the said head was proper.

42. Since the deceased was not in gainful employment where she was expected to retire at some time in future, I have no reason to interfere with the multiplicand of 12 adopted by the trial court. As was noted by **Apaloo, JA** (as he then was) in **Wambua vs. Patel & Another [1986] KLR 336**:

“As the plaintiff was self-employed, he could not be obliged to retire on attaining a prescribed age, as many employees are. Barring accidents and other unforeseen events, he should have continued in his trade as cattle dealer until he attained the age of 62. He is therefore given a working life of ten years.”

43. Accordingly, I set aside the award of Kshs 50,000/- and substitute therefor an award of Kshs 5,190/-. Save for that the appeal otherwise fails but with no order as to costs.

44. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 15TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MS GATHONI FOR MS WAMBUA FOR THE RESPONDENT

CA SUSAN