



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 71 OF 2019

HARUN KABURU M'KIARA.....APPELLANT

VERSUS

BWM (Suing as the legal representative & administrator of Estate of the

KM (DECEASED)..... RESPONDENT

(An appeal from the judgment of the Chief Magistrate Court at Meru, by Honourable L. Ambasi (CM) delivered on 30th May 2019 in Meru CMCC No. 47 of 2015)

BETWEEN

BWM (Suing as the legal representative & administrator of Estate of the

KM (Deceased).....PLAINTIFF

VERSUS

HARUN KABURU M'KIARA.....DEFENDANT

JUDGMENT

[1] The appellant being the respondent in the trial court was sued by the respondent for general damages under the Law Reform Act, interest on such damages, costs of the suit as well as any other relief the court deems fit to grant. On 30/5/2019 the trial court entered judgment in favour of the respondent as follows:

- a) Liability 100%
- b) Pain and suffering Kshs. 50,000/-
- c) Loss of expectation of life Kshs. 100,000/-
- d) Loss of dependency Kshs. 2,500,000/-
- e) Funeral expenses Kshs. 100,000/-
- TOTAL..... Kshs. 2,750,000/-**
- f) Costs and interest

[2] The appellant being aggrieved by the decision filed his appeal based on six (6) grounds which may be summarized into one: **that the learned trial magistrate erred both in law and fact in her assessment of damages.**

[3] This appeal was canvassed by way of written submissions. The appellant submitted that the appeal is hinged on the award as it was exorbitantly high. Damages are not meant to enrich the aggrieved party but to compensate an injured party for the injuries sustained. He urged the court to award at most Kshs. 500,000/- for loss of dependency, Kshs. 10,000/- for pain and suffering and no compensation for funeral expenses which was neither pleaded nor proved. He made reference to **Samwel Kimutai Koriri (suing as personal and legal**

representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School) & another [2016] eKLR, JNK (Suing as the legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR, Oshivji Kuvengi & another v James Mohamed Ongenge (Suing as a representative of the estate of SAMUEL ONGENGE) [2012] eKLR and Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016] eKLR to support his claim.

[4] The respondents submitted that she proved her claim on a balance of probabilities and thus the court not to interfere with the same as the award was merited as the trial magistrate did not proceed on wrong principles. She stated that the award for loss of dependency of Kshs. 2,500,000/- to the estate of the deceased minor was just and fair and in fact it ought to be readjusted upwards. She relied on the following cases: **Eliud Sindani Majimbo Matumbai v Cleophas Wanyonyi Simiyu & Gilbert Ojema Olale [2004] eKLR, MMG v Muchemi Teresa [2015] eKLR and Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR** to support her case.

[5] As the first appellate court, this court is to evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

[6] The issue of determination is *whether the trial court adopted wrong principles in the assessment of damages.*

[7] This being an appellate court of the first instance it is trite law that it ought not to interfere with the findings of a trial court on an award of damages. To interfere, this court must be convinced that the trial magistrate acted on wrong principles of law or that the award was so high or so low as to make it an entirety erroneous estimate of the damages to which the plaintiff is entitled. This general principle was articulated in the renown case of **Butt v Khan [1981] KLR 349** where it was her per Law, JA as follows:

“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 at a figure which was either inordinately high or low.”

Also, the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** similarly held:

“As a general principle, assessment of damages lies in the discretion of the trial court and 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 at a figure which was either inordinately high or low. The Court must be satisfied that either 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 be a wholly erroneous estimate of the damages.”

[8] The trial court awarded the respondent Kshs. 100,000 for loss of expectation of life which the appellant has not disputed. Thus, this court will not disturb it. For pain and suffering the respondent was awarded Kshs. 50,000/- and Kshs 2, 500,000/ for loss of expectation of life. According to the appellant, these awards are too high and ought to be reduced to Kshs. 10,000/- and Kshs.500, 000/- respectively.

[9] In the case **Simon Kibet Langat & another v Miriam Wairimu Ngugi(Suing As The Administrator Of The Estate Of Daniel Mwiruti Ngugi [2016] eKLR** Kshs. 30,000/- was awarded for pain and suffering and Kshs. 720,000/- for loss of dependency in respect of the estate of a 14 year child. In **Daniel Mwangi Kimani & 2 others v JGM & another (the personal representatives of the estate of NK (DCD) [2016] eKLR** Kshs. 20,000/- was awarded for pain and suffering and Ksh1, 000,000/- for loss of dependency in respect of the estate of a child of the age of 9 years. In **Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased) [2018] eKLR** the High Court in its appellate jurisdiction upheld the award of Kshs. 30,000/- for pain and suffering but the award of Kshs. 1,200,000/- for loss of dependency was set aside and substituted with an award of Kshs. 720,000 in respect of the estate of a child who was 12 years old.

[10] Accordingly, I am of the considered view that the award of Kshs. 50,000/- and Kshs. 2,500,000/- for pain and suffering and loss of dependency was excessive and or inordinately high. The award of Kshs. 30,000/- and Kshs. 1,200,000/- is fair compensation for pain and suffering and loss of dependency respectively.

[11] As for funeral expenses the appellant argued that this is a special award which must be specifically pleaded and proved. And that the respondent failed to do so thus it ought not to be awarded. The Court of Appeal **In Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR** had this to say on this issue :

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

Also, the Court of Appeal in the case of **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR**

held that:

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. ... 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. However, the claim herein did not fall in that class.”

In the case of **JNK (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR** Gikonyo J having made reference to the above case held:

“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.”

[12] It is trite law that when it comes to special damages they must be pleaded and proved. However, perusal of the above cases reveals that that where funeral expenses are pleaded, they may be awarded even though there are no receipts. The policy foundation is that... ***the court occasionally loosen [ing] this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses...*** Be it known that it is of common notoriety that costs were incurred as a result of the burial of the deceased. In all the above cases the aggrieved parties all had pleaded funeral expenses but lacked receipts to support the claim. In this case the respondent did not plead a claim for funeral expenses or mentioned it anywhere. The omission removes this case from the class of cases where the rule on special damages may be loosened. Needless to state that a party is bound by their own pleadings. In the result, I set aside the award of Kshs. 100,000/- as it was based on no plea. Here I must state that a general plea for special damages with a specific item on funeral expenses ought to, at least, have been stated in the pleading. Such impleading is lacking, thus, the award on this item lacks a foot on which to stand.

[13] In light thereof, I make the following orders: -

- a) Liability100%
- b) Pain and suffering Kshs. 30,000/-
- c) Loss of expectation of life Kshs. 100,000/-
- d) Loss of dependency ...Kshs. 1,200,000/-
- TOTAL..... **Kshs. 1,330,000/-**
- e) Costs on the award
- f) Interest at court rates.
- g) Parties to bear their own costs of the appeal.

Dated signed and delivered in open court at Meru this 10th day of February, 2020

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F. GIKONYO

JUDGE

In presence of Mwiti for Kirichu for appellant

Miss Otieno for respondents

F. GIKONYO

JUDGE