



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**[Coram: A.C. Mrima, J.]**

**CIVIL APPEAL NO. 126 OF 2018**

**VICTOR OCHIENG ODOYO.....APPELLANT**

**-VERSUS-**

**NASHON OKOTH OWUOCHA (Suing as Legal Representative of the estate of**

**ELIZABETH ADOYO OKOTH (Deceased).....RESPONDENT**

**(Being an appeal arising from the judgment and decree by Hon. R. Odenyo Senior Principal Magistrate in Migori Magistrate's Civil Case No. 665 of 2016 delivered on 22/08/2018)**

**JUDGMENT**

1. The Respondent herein, **Nashon Okoth Owuocha**, filed **Migori Chief Magistrate's Civil Case No. 74 of 2016** (hereinafter referred to as '**the suit**') against the Appellant herein, **Victor Ochieng Odoyo** and one **Dominic Oyaro**. The Respondent was the husband to Elizabeth Adoyo Okoth (hereinafter referred to as '**the deceased**') who passed on as a result of a road traffic accident which occurred on 23/06/2015, the subject of the suit. The Respondent instituted the proceedings as a personal representative of the Estate of his said wife. He claimed General Damages, Special damages, Costs and Interests.
2. The Respondent sued the Appellant herein as the registered owner of the offending motor vehicle registration number KCB 178B (hereinafter referred to as '**the vehicle**') and Dominic Oyaro as the Appellant's authorized driver, agent and/or servant.
3. The suit was defended. The Appellant denied all the averments and put the Respondent into strict proof. The suit was fully heard. The Respondent testified as **PW1** and called an eye-witness one **Jerroboam Juma Abinyo (PW2)**. The Appellant did not testify.
4. In a decision rendered on 22/08/2018 the trial court found the Appellant wholly liable for the accident. An award of Kshs. 11, 090, 000/= on General Damages was made together with Costs and Interests.
5. Only the Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment. In a Memorandum of Appeal filed on 21/09/2018 the following seven grounds were preferred: -

1. **THAT the learned magistrate erred in law and fact in basing his findings on irrelevant issues not supported by evidence adduced or applicable law.**
2. **THAT the learned magistrate erred in fact and in law in wholly disregarding or failing to accord due and proper consideration upon the defence written submissions in totality with resultant miscarriage of justice to the appellant.**
3. **THAT the learned magistrate erred in fact and in law in injudiciously, arbitrary and exorbitantly apportioning and awarding the plaintiff the quantum of Kshs. 11,000,000/= plus costs at the court rates which was excessive and manifestly high in the circumstance.**
4. **THAT the learned magistrate erred in fact in law in considering the dependency ratio of 2/3 in the circumstance as the deceased could not realistically have been expending 2/3 of her supposed income to support the alleged defendants.**
5. **THAT the learned magistrate erred in fact and in law in making an award of damages of Kshs. 11,000,000/= as loss of dependency when no such proof / or evidence of deceased income was tendered and/or alluded to at the hearing of the suit.**

6. THAT the learned magistrate erred in fact and in law in failing to consider conventional awards in case of similar nature.

7. THAT the learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

6. Directions were taken and the appeal was disposed of by way of written submissions where both parties filed their respective submissions.

7. Counsel for the Appellant submitted on the subject of damages only. He contended that the damages were too excessive and did not reflect a fair compensation. He faulted the trial court's adoption of the multiplicand and the dependency ratio. In the end the Appellant made a case for an award of Kshs. 577,520/= on damages. He relied on several decisions.

8. The Respondent opposed the appeal. He supported the decision of the trial court and prayed that the appeal be dismissed with costs. In doing so, the Respondent took the Court through the evidence adduced at the trial court in demonstrating how the Appellant was wholly liable. The Respondent also supported the assessment on quantum of damages.

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga -versus- Kiruga & Another (1988) KLR 348**.

10. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

11. From the Appellant's submissions it appears that the appeal is mainly on the limb of damages. The starting point is the law on appeals on award of damages. I have in several previous decisions reiterated, and which I hereby once again do, that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277**.)

12. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services** (supra) discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

**The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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 damage.**

13. This position was further restated by the Court of Appeal in **Arrow Car Limited -vs- Bimomo & 2 Others (2004) 2 KLR 101** and in **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR** among others.

14. I will now deal with whether the monthly income of Kshs. 70,000/= adopted by the trial court was without any basis and ought to be interfered with.

15. According to the Amended Plaintiff the deceased was a businesswoman. In the written statement the Respondent described the deceased as follows: -

**My wife was a well known robust business woman in Awendo town where she operated several butcheries. She was an aggressive sugarcane farmer and also ventured into buying and selling of sugarcane to various millers for profit. Her average monthly income was about Kshs. 70,000/=.....**

16. Substantiating the above, the Respondent produced several documents. They were a Single Business Permit, a Bank Statement and various Cane Collection Slips issued by Transmara Sugar Co. Ltd. I have carefully considered the said documents.

17. The Single Business Permit was issued by the County Government of Migori on 11/03/2016. It was for the Year 2016. It was issued to the Respondent and authorized him to carry out butchery activities. There is no evidence to support the averment that the deceased operated several butcheries. The contention therefore fails.

18. The Respondent produced a Bank Statement and various Cane Collection Slips issued by Transmara Sugar Co. Ltd in proof of the contention that the deceased was an aggressive sugarcane farmer and ventured into buying and selling of sugarcane to various millers for profit. The Bank Statement has two main credits made on 06/07/2015 and 17/07/2015 respectively. The source(s) of the credits is/are not indicated. However, there is no doubt that the deceased earned some income.

19. There is evidence that the deceased supplied sugar cane to Transmara Sugar Company Ltd. Since it is not clear how much the deceased used to make from her dealings with the sugar company, it may be overzealous to settle for the monthly income of Kshs. 70,000/=. I say so because according to the filed statement the basis for the said monthly sum was the income from the butcheries, farming and business with the sugar company. Having failed to prove that the deceased ran butcheries, then the proposed monthly income cannot still remain at Kshs. 70,000/=. The figure must scale downwards.

20. The Appellant submitted that this was a perfect case where the Court ought to be guided by the **Regulation of Wages (General Amendment) Order, 2015** instead. To that end, the Appellant proposed a monthly sum of Kshs. 5,844/=.

21. The deceased was self-employed. The Regulation of Wages (General Amendment) Order (amended from time to time) provide for wages of various employees/labourers. The Order is therefore not applicable in this case more so given that the deceased was a farmer and a business woman.

22. Regardless of the foregone, a Court of Law in pursuit of justice must appreciate the fact that there are many people in our society today who are engaged in various activities and earn a living but may not be able to adduce documentary evidence in proof of their income. In such cases Courts have been implored to draw reasonable conclusions on the income from the circumstances and the evidence on record. (See the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited Court of Appeal at Nyeri Civil Appeal No. 22 of 2014 (2015) eKLR, Jacob Ayiga Maruja & Another v. Simeon Obayo (2005) eKLR** among others).

23. Further, in appropriate cases a Court may be guided by the applicable Regulation of Wages Order.

24. By taking into account the foregone I am inclined to settle for the sum of Kshs. 50,000/= as the average monthly income for the deceased.

25. The other issue for consideration is the dependency ratio. The trial court settled for 2/3. The Appellant was of the view that 1/3 was appropriate in the matter.

26. In his testimony the Respondent testified that he was polygamous. He had 4 wives. Three of his wives had died by the time of testified before court. He also stated that he had 2 children who were in school. It was stated that the deceased was the major provider in the family and that she used pay school fees for the children apart from meeting other domestic bills.

11. Apart from producing copies of the receipts for fees payment for the two children there was no evidence that it was indeed the deceased who paid the fees. The receipts were in the names of the children. Further, paragraph 7 of the Amended Plaintiff stated that the deceased was survived by two people who were the Respondent and a minor daughter one **Helda Akinyi**. Conversely, the receipts were for two boys namely Brian Omondi Okoth and Mark O Okoth. The evidence of fees payment for the two boys was therefore not supported by the pleading. In that case such evidence was for rejection. (See the Court of Appeal decisions in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** and that of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281**).

27. The Respondent produced a Business Permit that confirmed that he was the one running the butchery business. There being no any evidence of dependency on the deceased and coupled with the fact that it is unlikely for one wife in a polygamous set up to provide for the rest of the wives and children of the whole family I find that the dependency ratio ought to be interfered with. One-third of the income may be reasonably taken to have been spent on the family. I so find.

28. The upshot is that the sum payable under the limb of loss of dependency would be Kshs. 4,000,000/= instead. The total amount payable in terms of damages is hence Kshs. 4,110,000/= since there is no legal requirement that the amount awarded under the limb of loss of expectation of earnings must be deducted from the award on loss of dependency. (See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased)** (supra) among others).

29. I now make the following final orders in this appeal: -

**a. The appeal is partly allowed on quantum of damages.**

**b. The award of Kshs. 11,090,000/= is hereby set-aside and instead the sum of Kshs. 4,110,000/= is awarded.**

**c. Since the appeal was on both liability and quantum and has partly succeeded each party to shoulder its own costs.**

**d. For avoidance of doubt, the costs of the suit shall in any event be borne by the Appellant.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 7<sup>th</sup> day of February, 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Messrs. Kairu & Mc Court** Advocates for the Appellant.

**Mr. Odhiambo Kanyangi** instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Respondent.

