



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 56 OF 2018

ANTONY MUTHAMIA NGURWE1ST APPELLANT

EDWIN MBUGUA 2ND APPELLANT

VERSUS

JANE NKATHA KATHURIMA (Suing on behalf of the estate of the late

JOHN KIMATHI KATHURIMA).....RESPONDENT

(Being an appeal from the Judgment and decree by Hon. L. Ambasi, CM in the Meru CMCC No. 35 of 2015 delivered on 23/10/2017)

J U D G M E N T

1. **JANE NKATHA KATHURIMA** (“the respondent”) sued the appellants in the trial Court seeking general damages under the Fatal Accidents Act and the Law Reform for the wrongful death of **John Kimathi Kathurima** (“the deceased”). She also sought special damages, costs and interest.

2. In her statement of claim, she pleaded that she was the mother of the deceased. That on 21/11/2013, the deceased was lawfully walking along Nkubu – Meru road when he was knocked down by motor vehicle registration no. KBX 645E, owned by the 1st appellant and at the time driven by the 2nd appellant. She blamed the appellants for the accident.

3. The respondent further pleaded that the deceased was aged 28 years at the time of his demise and was a farmer supporting her. As a result of his demise, she had suffered loss and damage.

4. The defendants denied the claim. At the hearing, the parties recorded a consent on liability at 70/30 in favour of the respondent. The Court proceeded to quantify damages as follows: -

- a) Under the Law Reform Act Kshs. 150,000/-
- b) Under the Fatal Accidents Act Kshs. 2,000,000/-
- c) Specials Kshs. 31, 765/-

5. In its final computation, the Court deducted Kshs.100,000/- awarded under the **Law Reform Act** allegedly to avoid double compensation.

6. It is against the aforesaid assessment that the appellants have appealed to this Court raising a total of 7

grounds which can be collapsed to only two as follows:-

a) That the trial Court erred in adopting a multiplicand of Kshs.25,000/- and a multiplier of 20 years thereby arriving at an excessive and inordinately high award of damages.

b) That the trial Court failed to consider

7. The appeal was canvassed by way of written submission which this Court has carefully considered.

8. It is the duty of this court as the first appellate Court to revisit the evidence on record, evaluate it and reach its own independent conclusions and findings. (See **Selle & Anor vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, in so doing the Court will bear in mind that the trial Court had the benefit of seeing and observing the witnesses.

9. The only issue in this appeal is the quantum of damages. As an appellate court, this Court will not interfere with an award of damages unless the award is so inordinately high or low as to represent an erroneous estimate. Or, if the trial court took into consideration an irrelevant material or failed to consider a relevant matter. See **Butt v Khan [1982-88] KAR 5**.

10. The only witness who testified at the trial was the respondent. She told the Court that she was the mother of the deceased. She stated that the deceased was a crop and dairy farmer and she estimated his income to be Kshs 30,000 per month. However, she did not back her claim by any documentary evidence. In its judgment, the trial Court adopted a sum of Kshs.25,000/- per month.

11. The trial Court was guided by the Court of Appeal decision in **Jacob Ayiga Maruja & Another v. Simeon Obayo [2005] Eklr**, wherein it was held that, it is not necessary that the only way to prove the profession and income of someone is by production of documents. Other evidence can be led to prove those facts.

12. The first ground was that the trial Court erred in adopting a multiplicand of Kshs.25,000/- per month and a multiplier of 20 years which led to an excessive award. It was submitted for the appellant that since there was no documentary proof of the deceased's income or occupation, the court should have adopted the minimum wage or a global award. The case of **John Wamae & 2 Others v. Jane Kituku Nziva & Another [2017] Eklr** was cited in support of that submission.

13. On the respondent's part, it was submitted that since the respondent had testified that the deceased's income was Kshs.30,000/- per month, the multiplicand of Kshs.25,000/- adopted by the Court was reasonable.

14. In **Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR**, Nambuye J., as she then was, held that:-

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books”.

15. I hold the same view. Where the amount of income claimed cannot be verified, it would be preferable to adopt a global sum approach. This is so because the process of assessment of damages should not be based on assumptions and speculation but on evidence that is predictable.

16. In **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** the court of Appeal 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.”

17. In the present case, it is not clear the basis on which the multiplicand of Kshs.25,000/- per month was adopted. This is so considering that this was no evidence how much a crop and daily farmer in the bracket of the deceased, would earn. The court should have adopted a global sum in approach.

18. In this regard, I will interfere with the exercise of the discretion by the trial Court on the award of dependency. I set aside the award of Kshs.2,000,000/-. Considering the age of the deceased and the nature of the work he was undertaking, an award of a global sum of Kshs.1,300,000/- for loss of dependency would be reasonable.

19. The second ground was that the trial Court erred in failing to consider the submissions of the appellants and in failing to apply the doctrine of *stare decisis*. This ground is not without basis. Had the trial Court considered the submissions of the appellant, it would have seen the case of **Morris Gitonga (suing as the legal representative of the estate of B.M) vs. Morris Mutunga Kyaula & Another [2017] Eklr**, where it was held that a global figure should be resorted to where income cannot be ascertained with certainty. That ground also succeeds.

20. Before concluding this judgment, I wish to point out on an error that the trial Court fell into. The trial Court deducted the sum of Kshs. 100,000/- which was awarded under the Law Reform Act from the final figure on the basis that there would be double compensation.

21. That is a misdirection. There has been a misconception that an award under the ***Law Reform Act (loss of expectation of life)*** should be deducted from the award made under ***the Fatal Accidents Act (loss of dependency)***. That is a wrong interpretation of the law. This has been caused by the wrong interpretation and/or understanding of the Court of Appeal decision in the case of **Kemflo Africa t/a Meru Express & Another v. A. M. Lubia & Another [1982-1988] 1 KLR 727**.

22. The Courts who have adopted that practice may not have considered the majority decision of that Court. The interpretation given by the majority was that the benefits under the ***Law Reform Act*** are in addition to those under ***the Fatal Accidents Act***. The direction that in making an award under the ***Fatal Accidents Act*** the court take into account benefits awarded under the ***Law Reform Act*** does not mean that the same be deducted. It is not a mathematical deduction that is called upon. All that is required is for the Court to give a moderate award having in mind that the claimant has already benefited under the other statute. This is why the benefits under the ***Law Reform Act*** rarely exceed Kshs.150,000/-.

23. Although there was no cross-appeal, since I have interfered with the trial courts discretion in its award for dependency. I will disturb that part of the judgment that deducts Kshs. 100,000/= from the award.

24. In view of the foregoing, I find the appeal to be meritorious and I allow the same. I set aside the judgment of the trial Court and enter judgment for the respondent as follows: -

a) general damages

- i) Pain and suffering - Kshs. 50,000/-**
- ii) Loss of expectation of life - Kshs. 100,000/-**
- iii) Loss of dependency - Kshs. 1,300,000/-**

b) Special damages - Kshs. 31,765/-

Total - Kshs. 1,481,765/-

Less 30% - Kshs. 444,529/50

Balance - Kshs. 1,037,235/50

c) Interest on the said sum from the date of judgment before the trial Court.

d) Costs of the appeal is awarded to the appellant.

DATED and **DELIVERED** at Meru this 20th day of May, 2020.

A. MABEYA

JUDGE