



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 39 OF 2017

MIDLAND MEDIA LIMITED.....1ST APPELLANT

ERIC MUIGAI MUTHUL.....2ND APPELLANT

VERSUS

PAULINE NAUKOT AULE (Suing as the Legal Representative

of the Estate of the late

ESINYON ESOKON EKAI.....RESPONDENT

JUDGMENT

Brief Background.

1. This Appeal is against the trial Court's awards in special and general damages awarded to the deceased's estate who died in a road traffic accident involving the Appellants vehicle Reg. No. KBJ 703V/ZC 3008 on the 24/7/2015 along Nakuru-Eldoret road at Baraka area.

2. The deceased was riding a bicycle when the appellants vehicle knocked him down causing him to sustain serious injuries from which he died. He was 57 years old, and stated to have been a businessman with a monthly income of Kshs.12,000/= from which he supported his family of a wife and three minor children; particulars stated in the plaint.

3. In the Respondent's statement of claim a sum of Kshs.36,500/= is pleaded as special damages being Shs.35,000/= charges for application for grant of letters of Administration, Shs.500/= fees for official search of the accident motor vehicle and Shs.100/= for police abstract. The special damage was by consent of the Respondent and the 2nd Appellant amended to Kshs.62,350/=

4. The trial court awarded to the Respondents damages as hereunder:

- Pain and suffering – Shs.10,000/=
- Loss of expectation – Shs.150,000/=
- Loss of dependency – Shs.607,776/=
- Special damages – Shs.62,350/= (against the 2nd defendant and Shs.35,000/= against the 1st Defendant)
- Plus costs and interest

5. The appeal is against the above awards, the Appellant stating that they were awarded in violation of the principles set down in assessment of damages under the **Law Reform Act Cap 26 and Fatal Accidents Act Cap 32 Laws of Kenya**, in particular that the special damages were neither pleaded nor strictly proved.

6. In respect of general damages the appellant faults the trial court for failure to consider the age of the deceased against the multiplier applied, and failure to deduct the awards under the Law Reform Act from the awards under the Fatal Accidents Act, submitting that the beneficiaries entitled to the awards under both statutes are the same, and further that they are excessive.

7. This court has thus been urged to review or set aside the awards. The appellants were held to have been wholly to blame for the accident.

8. The duty of the first appellate court is well settled: It is to marshal all the evidence adduced before the trial court, subject it to scrutiny, re evaluate and re analyse and come to its own findings and conclusion – **Selle Vs. Associated Motor Boat Co. Ltd (1968) EA 123.**

9. In the matter of assessment of damages under the Fatal Accidents Act, the principles were stated in the cases **Kemfro Africa Ltd Vs. A.M Lubia (1982-85) 1 KAR 727, and Beatrice Wangui Thairu Vs. Hon Ezekiel Bangetuny & another Nairobi HCC NO. 1638 of 1988 (UR)** among others.

10. In the matter of **double and or duplicate awards under both Acts, the Court of Appeal in Hellen Waruguru Waweru (Suing as the Legal representative of Peter Waweru Mwenja (deceased) Vs. Kiarie Shoe Stores Ltd (2015) e KLR, gave guidelines and rested the matter**

I shall refer extensively to the above decisions.

11. I have considered the parties written submissions

Analysis and Determination.

12. **The age of the deceased** was dully proved by a Death Certificate to have been 57 years old (PExhibit 3). His dependents are stated in the Chief's letter and in Birth Certificates of the children– Pexhibit 4 and 5. Awards under the Law Reforms Act Cap 26 Laws of Kenya are not under challenge. The above documents sufficiently proved the deceased age, and his dependants.

13. **It is trite that special damages** ought to be strictly pleaded and proved.

The pleaded amount is kshs.35,600/= and particularized – see paragraph 3 above. By consent of the Respondent and 2nd defendant, special damages were stated as Kshs.62,350/=. The trial court in awarding the said sum made a finding that it the said sum was proved, which is the position taken by the Respondents. Though stated as a ground of appeal, no submission was tendered in support. This court will not interfere with the court's discretion in allowing the sum of Kshs.62,350/= as a special damage there being no challenge by any submission in support. The said award is upheld.

Damages under the Fatal Accidents Act Cap 32 Laws of Kenya.

14. The appellants submit that the deceased having died at the age of 57 years old, the trial court erred in applying a Multiplier of 13 years without considering vagaries and unpredictability of human life, and proposed two (2) years. In support of the proposition, the case of **Mary Njeri Murigi Vs. Peter Macharia & another (2016) e KLR and Muasya Mhuri Kiseli Vs. Martin Mutisya Kiio & another (2010) e KLR**, where a multiplier of two (2) years was applied for a 58 year old self employed deceased, based on the retirement age of 60 years. The trial court failed to state the basis for the application of 13 years as the multiplier, nor 2/3 as the multiplicand; nor the rationale in the income of Shs.5,844/= per month, but stated to have fully relied on the parties submissions as filed. I have considered the submissions before the trial court, and the judgment.

15. On Income:

It is noted that the deceased was a businessman though no documents were placed before the trial court to prove existence of the said business nor its nature. The deceased's wife (PW1) testified that the deceased's income was Kshs.12,000/= per month from which the deceased supported his family, but no evidence was tendered to support the evidence.

In the absence of strict proof of a deceased's earnings/income, it is prudent that the court reverts to the basic wages in terms of the Regulations of Wages (General) (Amendment) order for the relevant period, the year 2015. The deceased's business was not stated in the plaint. His widow (PW1) did not state the nature of the business.

16. In the case **Nyamira Tea Farmers Sacco Vs. Wilfred Nyambati Kiraita (2011) e KLR**, the court rendered that in the absence of proof of income, the trial magistrate ought to have reverted to the Regulations of Wages for the period.

Under the 2015 Regulations, a general worker's monthly income is stated as Kshs.5,844/=. This is the category of workers that is relevant as no specific work was stated for the deceased.

17. The trial magistrate adopted and used the above sum, Shs.5,844/= as the deceased income . I find it to have been in order. I uphold the same.

On Multiplier

18. The Respondent proposed 20 years in his submissions, reasoning that the deceased was in good health and would have continued working after 60 years. The appellants proposed two years, which it has reiterated before this court.

I have considered the propositions.

The deceased was not in formal employment. It was not said he was of poor health. Without a doubt, visititures of life and its uncertainty must be considered as necessary factors in arriving at a reasonable multiplier.

19. In self-employment business ventures, it is not uncommon that a person may work up to the 60's, 70's and even 80's, depending on the type of venture. **Indeed Waweru J in Mutuku Mbithi Vs. Coast Bus Safaris Ltd & another (2012) e KLR applied 5 years for a 57 year old deceased in 2012. The Court of Appeal in Joyce Mumbi Mugi Vs. The Co-operative Bank of Kenya Ltd & 2 Others**, the deceased was 51 years old. A multiplier of 11 years was found reasonable.

In **Beatrice Nyanchama Obuya Vs. Hussein Dairy Ltd (2010) e KLR**, the court applied a multiplier of 15 years for a 45 years old deceased.

20. It is trite that no two cases can be similar, but only comparable. Upon my own discretion guided by the above cases and peculiar circumstances of this case, **I hold and find that the multiplier of 13 years adopted by the trial court was slightly higher than in comparable decisions.**

To conform to uniformity in awards of damages, **I reduce the multiplier to a more rational and reasonable figure of 10 years.**

The multiplicand of 2/3 is not contested.

Thus **loss of dependency is reviewed downwards to $5,844 \times 12 \times 10 \times \frac{2}{3} = 467,520/=$**

Double Compensation under the Law Reform Act, and Fatal Accidents Act.

21. The Court of Appeal in **Kemfro Vs. A.M Lubia (Supra)** set the principles in assessment of damages under the two statutes.

Although in the case, the court held that

“the net benefit will be inherited by the same dependants under the Law Reform Act and must be taken into account in the damages under the latter Act must be offset by the gain from the estate under the former Act”.

It does not mean, a position I hold, that a claimant under the Fatal Accidents Act should not benefit or be denied damages for pain and Suffering under the Law Reform Act as that cannot be duplication of compensation.

22. The Court of Appeal in **Hellen Waruguru Waweru in Nyeri Civil Appeal No. 22 of 2014 (2015 e KLR)** put the matter to rest, when it rendered;

“This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise”.

For the foregoing, the matter of double compensation raised by the Appellant must rest as stated above. I need elaborate.

In conclusion, the appellants appeal succeeds only on one ground; the multiplier adopted in assessment of damages for loss of dependency.

The reviewed awards will thus be;

- **Pain and Suffering - Kshs.10,000/=**
- **Loss of expectation of life – Kshs.30,000/=**
- **Loss of Dependency – Kshs.467,520/=**
- **Special damages – Kshs.62,350/=**
- Total – Kshs.569,870/=**

24. The appeal having succeeded partially, each party shall bear own costs.

Orders accordingly.

DELIVERED, SIGNED AND DATED ELECTRONICALLY AT NAIROBI THIS 15TH DAY OF JULY 2020.

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J.N. MULWA

HIGH COURT JUDGE