



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 494 OF 2018

WAGAKO GABRIEL.....1ST APPELLANT

DAVID NDUNGU MUGO.....2ND APPELLANT

VERSUS

ANGLINE KAMANTHE KILONZO.....1ST RESPONDENT

ESTHER MORAA MOSETI (Legal representative of the Estate of

MOSES NYAMWEYA MOSETI).....2ND RESPONDENT

(Being an appeal from the Judgment of the Hon. Magistrate, Mr. D.A Ocharo

dated 20th September, 2018 in CMCC No. 3747 OF 2016

Milimani Commercial Court, Nairobi)

JUDGMENT

This appeal follows the judgment of the lower court delivered on 20th September, 2018 whereby a total award of Kshs. 1,662,913.92 was made in favour of the respondents against the appellants. The judgment related to a claim by the respondents, following the death of one Moses Nyamweya Moseti who was involved in a road traffic accident when his motor cycle was knocked down by motor vehicle registration No. KAV 442F which was being driven by the 2nd respondent at the time of the accident.

Liability was agreed at 80% against the appellants and the deceased to bear 20% contributory negligence. The documents filed by the respondents were admitted without calling the makers and parties ordered to file submissions. This appeal is against damages awarded by the lower court.

In the Memorandum of Appeal dated 17th October, 2018, the appellants have complained that the award in respect of loss of dependency was excessive and unwarranted in view of the evidence adduced. The lower court was also faulted for applying a dependency ration of 2/3 in total disregard of want of proof of dependency. Further, the lower court was faulted for failing to deduct the award of loss of expectation of life of Kshs. 100,000/= and that the award of Kshs. 100,000/= for pain and suffering was excessive and unwarranted, in light of the evidence and cited authorities.

Finally, the lower court was faulted for not taking into consideration the written submissions of the appellants and that the judgment was against the weight of the evidence adduced.

I note that no oral testimony was given and therefore the plaintiffs and the respondents' evidence was what was presented before the court as evidence for the respondents herein. I also note from the plaintiffs that the beneficiaries were listed under paragraph 7 who included the wife of the deceased, mother, two daughters and one son. In fact, on the date of the accident the deceased was said to be taking one of his daughters to school.

Both parties have filed submissions but I must observe submissions may not take the place of evidence. It is now established that the appellate court may not interfere with awards made by the trial court, unless such awards are inordinately high or low or that the trial court misconceived the applicable principles.

The deceased died soon after the accident. The lower court made an award of Kshs. 100,000/= for pain and suffering. Considering that the death was instant and that no hospitalization was called for, the award of Kshs. 100,000/= for pain and suffering was on the higher side. I therefore reduce that award by half so that the award under that head is Kshs. 50,000/=

The deceased was a boda boda rider aged 36 years old at the time of death. There was nothing to suggest that he was in poor health. The award of Kshs. 100,000/= for loss of expectation of life was justified. The lower court rightly observed that his earnings were uncertain and the minimum wage was used to calculate loss of dependency. That wage is Kshs. 9,708.95.

I have noted there are submissions on the multiplier applicable. The lower court found that the deceased had 24 years to be involved in his work as a boda boda rider. At the age of 36 at the time of death, this would bring his age to 60 years. The work that the deceased was involved in was risky, just like the accident that claimed his life. This would compel any assessment of his earnings to be discounted because of such unforeseen events. I believe a multiplier of 20 years is appropriate in the circumstances of this case. With his dependants as pleaded, and not disputed by any form of evidence, it was more likely than not that the deceased spent 1/3 of his earnings on himself and 2/3 thereof on his dependants.

The objection raised by the appellants in their submissions in that regard cannot be sustained. I uphold the finding of the trial court that that is the correct ratio of dependency to be applied.

Where a court makes an award under the loss of expectation of life, it is now generally accepted that such an award should be taken into account when assessing loss of dependency. However, that does not necessarily mean that such an award should be deducted.

What this really means is that, the court bears in mind that the plaintiffs suit is both under the Fatal Accidents Act and the Law Reform Act. The lower court cannot be faulted in that regard.

Damages for loss of dependency works out as follows,

$Kshs. 9,780.05 \times 12 \times 20 \times 2/3 = Kshs. 1,564,952.$

In the end this appeal is partly allowed on the adjustment of figures relating to pain and suffering and loss of dependency. Therefore, there shall be judgment for the respondents as follows,

Pain and suffering	Kshs. 50,000/=
Loss of expectation of life	Kshs. 100,000/=
Loss of dependency	Kshs. 1,564,952/=
Special damages	Kshs. 700/=
Sub Total	<u>Kshs. 1,715,652/=</u>
less 20%	Kshs. 343,130.40
Total	<u>Kshs. 1,372,521.60</u>

The respondents shall also have the costs and interest at court rates in the lower court, while in in this appeal each party shall bear their own costs.

Dated and delivered at Nairobi this 9th day of July, 2020.

A.MBOGHOLI MSAGHA

JUDGE