



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 4 OF 2020

CHARLES OMBUNA CONTRACTORS LIMITED.....APPELLANT

=VRS=

ELLEN MORAA ONGERA & MARGARET NYABOKE NYARURI (Both suing as

Legal Representatives of the estate of FRED MORARA NYARURI (Deceased)....RESPONDENTS

{Being an appeal against the Judgement of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered on the 17th day of December 2019 in the original Nyamira Chief Magistrate’s Court Civil Case No. 84 of 2018}

JUDGEMENT

This appeal challenges the quantum of damages awarded to the respondents as a result of an accident that occurred on 21st February 2017 along the Nyamira – Miruka Road at Corner “S” and claimed the life of Fred Morara Nyaruri aka Mogaka (Deceased). The appeal is premised on five grounds the gravamen of which is that the trial Magistrate acted on wrong principles when assessing the damages and did not consider past awards and thus ended up awarding damages that were so inordinately high that they represented an erroneous estimate of the damage suffered by the respondents.

The appeal was canvassed by way of written submissions. Counsel for the appellant confined his submissions to the award for loss of dependency and specifically on the multiplicand and multiplier. On the multiplicand, Counsel submitted that in assessing the damages under that head the trial Magistrate should have resorted to the minimum wage as the deceased’s income was not proved. Counsel contended that as the deceased was a turn boy/conductor and the minimum wage for that category of workers was Kshs. 6,752/= this court should adopt that as the multiplier. To support this submission Counsel cited two cases, to wit: -

- **Francis & Nthiwa v Gregory Mwangangi & another [2009] eKLR.**
- **Tobias Odoyo Oburu v Jane Kerubo Miruka & another [2018] eKLR.**

In regard to the multiplier Counsel argued that given the vagaries of life the deceased who died at thirty could not have worked until he was sixty. Counsel contended that the work of a conductor is generally risky and exposes one to danger every day and hence the appropriate multiplier would be twenty years. Counsel relied on the following cases: -

- **Mary Kerubo Mabuka v Mucheke Mburu & 3 others [2006] eKLR** where a multiplier of twenty (20) years was adopted for a deceased who was twenty-six (26) years.
- **Sammy Kipkorir Kosgei v Edna Musikoye Mulinya & another [2017] eKLR** where the court adopted a multiplier of 20 years for a deceased who was 28 years.
- **Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Joseph Weyanga Tsuma, deceased [2009] eKLR** where a multiplier of 22 years was adopted for a deceased who was 33 years.

Counsel argued that in this case the trial Magistrate did not give an explanation for adopting a multiplier of thirty years and did not take into consideration that the dependants were all adults.

Counsel for the respondents started by pointing out the role of the first appellate court and the principles upon which an appellate court can interfere with a subordinate court’s award. Counsel urged this court to be guided by those principles. He relied on the case of **Paul Koech & another v Titus Osule Osore [2013] eKLR** and the case of **Kiwanjani Hardware & another v Nicholas Mule Mutinda [2008] eKLR**. On the multiplicand, Counsel submitted the respondents’ evidence that the deceased was a farmer earning a monthly income of Kshs.

20,000/= was not contested and based on the decision of the Court of Appeal in **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** the trial Magistrate correctly adopted that figure as the multiplicand. On the multiplier, Counsel relied on the case of **Susan Wanjugu Muchemi v James Kabathi Mwangi [2005] eKLR** where a multiplier of 26 years was adopted for a deceased who was 29 years. Also on the case of **Francis Wainaina Kirungu v Elijah Oketch Adellah [2015] eKLR** where the court adopted a multiplier of 35 years for a deceased who was aged 28 years. Counsel also cited the case of **Jacob Ayiga Maruja & another v Simeon Obayo (Supra)** and submitted that there the Court of Appeal adopted a multiplier of 8 years for a deceased who was 53 years and held: -

“.....We know of no law or any other requirement that a self-employed carpenter must retire at age 55 years. Mr. Kasamani did not point out to us any such provisions. The deceased was 53 years old at the time of his death. The learned trial Judge thought he would have pursued his carpentry business for some eight more years. There is absolutely no basis upon which we can interfere with that finding.”

Counsel urged this court to consider the cases cited and uphold the trial Magistrate’s award for loss of dependency. I shall ignore the rest of the submissions as the awards made under the other heads (Law Reform Act) are not contested in the appeal.

This appeal calls upon this court to interfere with the trial Magistrate’s award of general damages for loss of dependency. The award of damages is in the discretion of the trial court. As submitted by Counsel for the appellant, an appellate court will not disturb the award of the trial court unless it is so inordinately high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence – *see Kiwanjani Hardward Ltd & another v Nicholas Mule Mtinda [2008] eKLR*.

In the submissions, Counsel for the respondents submitted that the deceased was a farmer and cited the decision of the Court of Appeal in the case of **Jacob Ayiga Maruja & another v Simeon Obayo (Supra)** to persuade this court to adopt the multiplier of Kshs. 20,000/= being what was alleged by the deceased’s sister to be the income of the deceased. I have considered the testimony of the deceased’s sister and I note that during cross examination she abandoned the claim that the deceased was a farmer and stated that he was a conductor. Her exact words were **“The deceased was a conductor at the time of his death.”** I shall therefore take it that the deceased was a conductor not a farmer.

Unlike a farmer or carpenter whose income cannot be pegged to a minimum wage, a conductor’s wage if not known can be discerned from the law and the approach by the courts has been to resort to the minimum wage prevailing at the time of the deceased’s death. I am persuaded therefore that the Learned Trial Magistrate acted on a wrong principle by adopting a multiplicand of Kshs. 20,000/= as the same was not proven. In my considered view the trial court should have instead resorted to the minimum wage. I accept the multiplicand of Kshs. 6,752/= proposed by Counsel for the appellant as that was the applicable minimum wage for a conductor at the material time.

As for the multiplier, I am persuaded that in light of the cases cited, the same was reasonable and I shall not disturb it. In the premises damages for loss of dependency shall now be calculated as follows: -

$$6,752 \times 30 \times 12 \times 1/3 = 810,240/=.$$

Section 4 (1) of the Fatal Accident Act expressly provides that damages under that Act, commonly referred as damages for loss of dependency, are for the benefit of a spouse, child, mother and father. That section states: -

“4. Action to be for benefit of family of deceased

(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct.....” (Underlining mine).

That award is not intended to benefit the siblings of the deceased. I note in this case that there really was no cogent evidence that the deceased was succeeded by his mother. There is no mention of her in the Chief’s letter which formed part of the respondent’s bundle of documents and at the trial only a casual mention of her was made by Pw1. However, as that was not raised by the appellant I shall leave it at that and direct that after the award for loss of dependency is subjected to the agreed ratio of contribution, the net award shall be to Margret Nyaboke Nyaruri who is named as the mother of the deceased. As the appellant has succeeded in having the award reduced, he shall get the costs of the appeal. It is so ordered.

Signed, dated and delivered in Nyamira this 8th day of October 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams