REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 2 OF 2020

RICHARD NYAMWEYA ORURU.....APPELLANT

=VRS=

ALICE KEMUNTO OMBORI & BENARD MOMANYI OGECHI

(Suing as the Legal Representatives of the estate of YUNUKE ANASI

OGECHI (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. 188 of 2017}

JUDGEMENT

The appellant has by the Memorandum of Appeal dated 14th February 2020 sought to set aside the judgement delivered by the trial court on 17th December 2019 in its entirety. The grounds of appeal are that: -

> **"1. The learned magistrate erred in law in making a finding of damages and liability against the defendant based on hearsay evidence when the matter ought to have been dismissed.**
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> **2. The learned magistrate erred in law and fact in holding the defendants 70% liable based on hearsay evidence as no eye witness was called by the Respondents to testify.**
>
> **3. The learned magistrate erred in law and fact in awarding unreasonable Loss of Dependency of Kshs. 2,880,000/= by taking a multiplicand of 12 years without taking into consideration the vagaries of life without taking into consideration the vagaries of life.**
>
> **4. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs. 2,880,000/= by taking an income of Kshs. 30,000/= without any tangible proof of the same.**
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> **5. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 90,050/= without concrete documentary evidence.**
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> **6. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 2,184,000/=.**
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> **7. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.**
>
> **8. The learned magistrate erred in law and fact in failing to appreciate as follows: -**
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> > **(i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.**

9. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on quantum.

10. The learned magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances."

The brief circumstances of the case in the court below were that on 9th May 2017 Yunuke Anase Ogechi, was walking along the Kisii – Nyamira Road when at a place called Sironga a motor vehicle Reg. No. KBR 111Q which was being driven by the appellant veered of the road as it was overtaking and hit her wounding her fatally. She is alleged to have died on the spot. According to one of her daughters she was a farmer who earned about Kshs. 30,000/= and upon her death her children lost dependancy. Although initially the appellant denied liability a consent was reached where liability was apportioned in the ration 70%:30% in favour of the respondents against the appellant. The trial court was then left to assess the quantum of damages which she did as follows: -

i. Pain & suffering – Kshs. 50,000/=

ii. Loss of Expectation of life – Kshs. 100,000/=

iii. Loss of dependency/lost years – Kshs. 2,880,000/=

iv. Special damages & funeral expenses – Kshs. 90,550/=

Less 30% contribution – Kshs. 936,165/=

Net sum – Kshs. 2,184,385/=

The appeal is opposed. When Counsel appeared before this court it was agreed that the appeal be canvassed by way of written submissions. I note that in the submissions Counsel for the appellant has abandoned the appeal as regards liability and rightly so as that issue was determined upon the consent of the parties and no valid grounds have been raised to warrant this court to set aside that consent.

On the quantum of damages, Counsel for the appellants' submission is that the same was inordinately high and excessive. Be that as it may, Counsel's submissions are confined to the award for loss of dependancy and more specifically on the twin issues of the multiplicand and the multiplier. In regard to the multiplicand, Counsel submitted that as there was no proof of income the trial Magistrate should have adopted the minimum wage of Kshs. 8,000/=. Counsel also faulted the trial court for adopting a multiplier of 12 years and submitted that the court should have taken into account the vagaries of life such as the AIDS epidemic, COVID-19 pandemic and other terminal diseases. He contended that a multiplicand of 7 years should have sufficed and damages under that head should therefore have been calculated as follows: -

8,000 x 12 x 7 x 2/3 = Kshs. 448,000/=

Counsel also argued that the award for loss of expectation of life should have been subtracted from that for loss of dependency. Counsel urged this court to allow this appeal and award the costs thereof to the appellant.

On their part, Counsel for the respondents citing several cases submitted that the trial Magistrate exercised her discretionary powers properly in arriving at the award and urged this court not to interfere but instead to dismiss the appeal with costs to the respondents.

The circumstances under which this court can interfere with the award of damages by the lower court have correctly been elucidated by Counsel for the parties and I see no need to reproduce them. The issue of liability is moot as there was a consent by Counsel for the parties and as I have explained above no grounds have been demonstrated to warrant this court to set aside that consent. The appeal challenging the award of damages is confined to the award for loss of dependency and more especially to the multiplicand and the multiplier. The dependency ratio of 2/3 was not contested and hence it shall be upheld. The awards under the Law Reform Act and the special damages are also not contested and in the premises this court shall also uphold them.

I have considered the rival submissions, the cases cited and the law in regard to the multiplicand and the multiplier. The deceased died aged 48 years. Being self-employed and a farmer at that, she was not bound to the mandatory retirement age of 60 years like her peers in employment and she could have worked even up to seventy or eighty years if her health so allowed. The trial Magistrate adopted a multiplier of 12 years basing her argument purely on the retirement age. In **Beatrice Mukulu Kanguta & another v Silvesterone Quarry Limited & another [2016] eKLR** the court adopted a multiplier of 10 years for a deceased who was 48 years old while in **Patrick Barasa v Serah Wambui Karumba (suing as the legal representative to the estate of the late albert chebaya) [2019] eKLR** a multiplier of 6 years was adopted for a deceased who was 52 years. In **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** the multiplier adopted for a deceased who was 44 years old was 16 years. I am not therefore persuaded that the trial Magistrate misdirected herself in adopting a multiplier of 12 years.

On the multiplicand, the family of the deceased did not have proof of her income. It is for that reason that Counsel for the appellant has submitted that the court should have adopted the minimum wage. That is indeed the usual approach by the courts and in my view the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR** did not render that approach moribund as all the judges did was to say that certificates are not the only means by which to prove the profession and earnings of a deceased. The court held: -

"In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month.

> **We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail."**

The court accepted that there was sufficient material on record from which to draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs. 4,000/=. In my view unlike the case of a salaried person whose salary cannot be proved and therefore resort to the minimum wage it is appropriate the deceased in this case was a farmer who had earnings from growing crops and keeping livestock as the carpenter in the case of **Jacob Ayiga (Supra).** Indeed, the court was told that she was grazing her cow when the accident occurred. Therefore, monthly income of Kshs. 30,000/= is in my view not farfetched and I would retain the same and hence uphold the award of the trial Magistrate.

Counsel for the appellant stated that the award for loss of expectation of life should have been reduced from the award for loss of dependency. However, in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** the Court of Appeal stated:

> **"[20] 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."**

In the premises I find the appeal is not merited and hereby dismiss it with costs to the respondents save to state that the net award under the Fatal Accidents Act (Loss of Dependancy) shall be distributed to the five children of the deceased in equal shares. It is so ordered.

Signed, dated and delivered in Nyamira this 1st day of October 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams