



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 44 OF 2016

PETER NGARI NJERU.....APPELLANT

VERSUS

ALCHANGER NJUE KITHOGO &

JOSPAT NJUE (Suing as Legal Representatives of

EUGENIO MUCHORI NJUE – Deceased).....RESPONDENT

JUDGMENT

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Resident Magistrate in Siakago PMCC No. 71 of 2014 which was delivered on the 12th July 2016.
2. The respondents herein filed a suit for compensation in terms of both special and general damages payable in the estate of the deceased under the **Fatal Accidents Act & the Law Reform Act**. The case was determined in favour of the respondents against the appellant at 65:35 on liability and damages all inclusive were awarded at **Kshs. 1,508,325/=**.
3. The appellant filed a memorandum of appeal dated the 8th August 2016 seeks for orders to set aside the judgement of the trial court. The appeal is grounded on the following points: -

1) That the trial magistrate erred in law and in fact by adopting a multiplicand of Kshs. 15,000/= per month without any evidence to support the same and thereby arrived at an award that is inordinately excessive.

2) That the learned trial magistrate erred in law and in fact by adopting a one half (½) dependency ratio whereas the deceased was unmarried and thereby arrived at an award that is inordinately excessive.

3) That the learned trial magistrate erred in law in awarding funeral expenses of Kshs. 30,000/= which were not pleaded.

4) That the judgement of the learned trial magistrate is against the law and weight of evidence on record.

4. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

5. On loss of dependency, the appellant submitted that the nature of the deceased's business activities was not stated and it was thus not known how the figure of Kshs. 20,000/= as his monthly earnings was arrived. It was the appellant's submission that where there is no certainty as to the deceased's income, the court ought to opt for a global award as opposed to speculative arithmetic calculations. The appellant thus urged this court to award the respondents a global sum of Kshs. 400,000/=. He relied on the cases of **John Wamae & 2 Others v Jane Kituku Nziva & Another [2017] eKLR, Kenya Power Lighting Company Limited v Charles Obegi Ogeta [2016] eKLR and Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR.**

6. On the special damages awarded as funeral expenses, the appellant submitted that it was never pleaded whereas the law requires the same to be specifically pleaded with clear particularity then strictly proved at the hearing and this was not done by the respondents.

C. Respondents Case

7. The respondents submitted that the trial court was right in finding that the dependency ratio of one half was reasonable as the deceased though unmarried had dependants and further assisted by paying fees for his siblings. They further submitted that the trial court was right in adopting a multiplicand of Kshs. 15,000 whilst relying on the finding in the case of Jackline Munui Nzioka v Jetha Ranji Era (NBI) C.A. 154 & 155 of 1996. The respondents relied on the cases of Jacob Ayiga Maruja & Anor v Simeone Obayo [2005] eKLR and Checkers Trading Ltd & Anor v Fatuma Kimanthi C.A. 317 of 2003.

8. As regards the funeral expenses, the respondents submitted that the trial court found rightly that the appellant did not address it in the submissions nor did he through counsel take issue with it at the hearing and as such it was unprocedural and illegal to raise it on appeal as it amounted to tendering evidence from the bar. They relied on the case of Premier Diary Ltd v Amarjit Singh Sagoo C.A. 312 of 2009.

D. Analysis & Determination

9. Having looked at the Appellant's grounds of appeal and the parties' respective submissions, it is clear to the court that the issues for determination are as follows;

a) Whether or not the loss of dependency as calculated by the learned trial magistrate was properly done.

b) Whether the damages for loss of dependency was manifestly excessive and/or inordinately high in the circumstances requiring interference by this court.

c) Whether in awarding the funeral expenses which had not been pleaded the trial court erred.

10. The principles on which an appellate court will disturb an award of damages are well settled: That an appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages as was enunciated in Butt v. Khan Civil Appeal No. 40 of 1997 thus: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low.” See also Kemfro Africa Ltd and Another vs A.M. Lubia & Another [1982-1988]

11. And Kemfro Africa Ltd v/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 [1882-1988] 1 KAR 727 where the said principles were also established.

12. From the proceedings, and from the respondent's evidence, no concrete evidence of the deceased's earnings was tendered. PW1 said it Kshs.700/= from selling miraa and Kshs.300/= from motorbike business totalling to Kshs. 1,000/= per day. During evidence in chief PW1 stated that the deceased earned Kshs. 20,000/= a month.

13. In MWANZIA -VS- NGALALI MUTUA KENYA BUS LTD and quoted in ALBERT ODAWA -VS- GICHUMU GITHENJI NKU HCCA NO.15 OF 2003 [2007], KLR, Justice Ringera was of the following view;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

14. This reasoning was adopted in MARY KHAYESI AWALO & ANOTHER -VS- MWILU MALUNGU & ANOTHER ELD HCCC NO. 19 OF 1997 [1999] EKLR where Nambuye J., stated 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 am of the considered view that the trial court should have awarded a global sum in the absence of concrete evidence of deceased's earnings. I rely on the case of MARY KHAYESI AWALO (Supra) where the deceased was 28 years old and had dependants including his mother and his children. In that case the deceased's dependants ended up being awarded Kshs. 450,000/=.

16. On the issue of funeral expenses, I rely on the case of ALICE O. ALUKWE V AKAMBA PUBLIC ROAD SERVICES LTD and 3 others HIGH COURT OF KENYA AT NAKURU CIVIL SUIT NO. 26 OF 2005 where it was held: -

“18” special damages (funeral expenses)

25. However she only produced the receipt for the police abstract and the advertisement charges. There were no receipts produced to prove the claim for funeral expenses. However, the court of appeal in the case of JACOB AYIGA MARUJA & ANOTHER V SIMEON OBAYO (2005) eKLR awarded the plaintiff Kshs. 60,000/= for funeral expenses and held thus.”

“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the KShs. 60,000/= we have awarded herein apply strictly to the circumstances of this case.”

17. It is not in dispute that the respondent was not sure or did not know how much the deceased earned. In such a case, it is trite law that courts will either use the minimum gazetted wage of skilled workers or use a global sum for damages on loss of dependency. In the case of ***Beatrice Murage Vs Consumer Transport Ltd & Another (2014) eKLR*** the court held: -

“Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage. However, in this case, the minimum wage cannot apply because the deceased was beyond employment age and there is totally no evidence that he earned anything for a living.”

18. I rely on the case of Mary Khayesi Awalo (supra) where it was held:

“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.”

19. I find that the magistrate erred in using the multiplier of Sh.15,000/- where there was no evidence of employment or income. I take into consideration that the case of ***Khayesi (supra)*** was decided in 2017. Taking into consideration factors of inflation, I award a global sum of Kshs. 800,000/= for loss of dependency.

20. I set aside the award of Kshs. 2,250,000/= by the learned magistrate. In his grounds of appeal, the appellant attacked the use of the formula of ½ to calculate the loss of dependency. In his submissions, the appellant did not argue this ground to demonstrate to this court how the magistrate erred.

21. The deceased was not married and had no children. His dependants were his parents and his siblings. In this regard, the deceased may have used half of his earnings on the dependants. I find no reason to disturb the formula adopted.

22. On the funeral expenses, the appellant argued that the same are special damages which were not pleaded. The magistrate had no basis of awarding Kshs. 30,000/=.

23. I have looked at the plaint and note that funeral expenses were not pleaded. It is in the submissions that the respondent asked for Kshs. 40,000/- as funeral expenses. It is trite law that funeral expenses may be awarded where a claim has been made based on the fact that burials attract certain expenses born by the relatives of the deceased. However, such expenses must not be specifically pleaded like is the case with special damages.

24. I find that it was erroneous for the magistrate to award expenses which were not claimed in the plaint. I hereby set aside the said award of Kshs. 30,000/=.

25. In effect, I find that this appeal is successful and allowed in the following terms: -

- i. Special damages 20,500/=
- ii. Pain and suffering 20,000/=
- iii. Loss of expectation of life 80,000/=
- iv. Loss of dependency 800,000/=

920,500/=

Less 35% contribution 322175/=

Kshs. 598,325/=

26. The amount of **Kshs. 598,325/=** is payable to the respondent by the appellant.

27. Each party to meet their own costs of this appeal. The appellant to pay the costs of the suit in lower court.

28. It is hereby so ordered.

DELIVERED DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maroko for Ogweno for respondent