



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 627 OF 2015

KARUIRU MURIUKI.....1ST APPELLANT

JOHN NGUGI MBUGUA.....2ND APPELLANT

VERSUS

GERSON OWUOR OUNDO & GRACE ATIENO OWUOR

(Suing as personal representatives for and on

behalf of the dependants and the estate of

LILIAN ADHIAMBO OWUOR [deceased]).....RESPONDENTS

JUDGMENT

1. The two appellants herein were the defendants in a suit filed against them in the lower court in which the respondents (then the plaintiffs) sought recovery of special and general damages under *The Law Reform Act* and *The Fatal Accidents Act*. They had sued the defendants in their capacity as the personal representatives of the estate of the late *Lillian Adhiambo Owuor* who was their daughter.
2. In their plaint dated 16th August 2013, the respondents alleged that the 1st appellant was the registered owner of motor vehicle registration number KBQ 604P which was recklessly and negligently driven by the 2nd appellant on or about 28th May 2012 along the Nairobi-Mombasa Road as a result of which it knocked down and ran over the deceased who was at the time lawfully walking off the road; that the deceased died later the same day owing to injuries sustained in the accident and that consequently, her dependants and estate suffered loss and damage.
3. The particulars of the deceased's dependants and the extent of their dependency were stated in paragraphs 8 and 9 of the plaint while the particulars of the loss allegedly suffered by her estate were enumerated in paragraph 10.
4. As the defendants denied the plaintiffs' claim in their joint statement of defence dated 15th October 2013, the suit proceeded to full trial after which the learned trial magistrate *Hon. L. Kassam (SPM)* rendered his decision on 3rd December 2015. The learned trial magistrate entered judgment on liability for the plaintiffs against the defendants at 100% and awarded them general damages in the total sum of KShs.6,850,000 and KShs.246,361 in special damages.
5. The appellants were aggrieved by the quantum of damages awarded to the respondents hence this appeal. They did not contest the trial court's finding on liability.
6. In their memorandum of appeal dated 16th December 2015, the appellants mainly complained that the learned trial magistrate erred in law and fact by committing the following errors: awarding exorbitant and excessive damages which were not based on any authority; awarding damages contrary to *Section 5* of the *Magistrates Courts' Act* and awarding special damages when they were not strictly proved as the receipts tendered in evidence to prove the said claim were inadmissible in evidence.
7. The appeal was prosecuted by way of oral submissions. During the hearing on 11th December 2018, the appeal was argued by learned counsel *Mr. Mukasa* who represented the appellants while learned counsel *Mr. Kefa Ombati* represented the respondents.
8. In his submissions in response to the submissions made by *Mr. Mukasa*, *Mr. Ombati* conceded that the sum of KShs.100,000 awarded to the respondents for the deceased's loss of expectation of life under the *Law Reform Act* ought to have been deducted from the final award as the beneficiaries of the award were the same persons who had been awarded damages for loss of dependency under the *Fatal Accidents*

Act. Mr. Ombati also conceded that the learned trial magistrate erred in using a multiplicand of KShs.60,000 which was the deceased's gross salary instead of KShs.47,607 which was her net salary. He however denied the appellants' claim that the trial court erred in adopting a multiplier of 14 years being the remainder of the years the deceased would have worked if her life was not suddenly cut short by the negligence of the 2nd appellant. Mr. Mukasa argued that the deceased had been employed under a three year term renewable contract and there was no guarantee that the contract would be renewed in future. He also attacked the dependency ratio of 2/3rds employed by the trial court contending that the deceased was not married prior to her death and that her parents were not her dependants as they were pensioners.

9. Mr. Ombati also contested Mr. Mukasa's submissions that the learned trial magistrate did not have pecuniary jurisdiction to award the damages awarded to the respondents and that the amount awarded as special damages was not strictly proved as the receipts relied on by the respondents were inadmissible in evidence for lack of revenue stamps. He also denied the claim that the award of KShs.30,000 for pain and suffering was excessive in the circumstances of this case.

10. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am fully alive to my duty of re-examining and re-evaluating the evidence presented before the trial court in order to arrive at my own independent conclusions. In so doing, I will be careful to remember that I did not have the benefit of seeing or hearing the witnesses. See: **Sielle V Associated Motor Boat Company Limited, [1968] EA 123.**

11. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the oral submissions made by counsel on record for both parties and the authorities cited.

12. Having done so, I find that the only awards that are contested in this appeal are the awards of KShs.30,000 for pain and suffering; the computation of the award for loss of dependency and the award of special damages. In the circumstances, the only question that falls for my determination is whether the learned trial magistrate erred in law or in fact in making the contested awards.

13. At the outset, I wish to point out that the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously within the confines of the law. The principles that guide an appellate court in deciding whether or not to interfere with an award of damages by a trial court has been restated in many authorities. It will be sufficient for purposes of this appeal to cite just two of them. In **Mariga V Musila, (1984) KLR 251**, the Court of Appeal while addressing its mind to this question held as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

In **Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another, (1987) KLR 30**, the same court expressed itself as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...”

Guided by the above principles, I now turn to address the issue I have distilled above for my determination.

14. Starting with the award for pain and suffering, it was argued on behalf of the appellants that the amount of KShs.30,000 was excessive since the deceased died on the same day of the accident. It is perhaps important to point out at this stage that general damages under this head are meant to compensate the deceased's estate for the pain and suffering the deceased had endured before death. A pertinent consideration in determining the damages payable under this head is the length of time the deceased suffered before succumbing to his or her injuries.

15. From the evidence tendered before the trial court, it is evident that even though the deceased died on the same day the accident occurred, she did not die instantly at the scene of the accident. She died later in the day while undergoing treatment at Shalom Hospital. According to the evidence adduced by PW2 who witnessed the accident, the accident occurred at about 6 a.m.

16. In making his award, the learned trial magistrate correctly observed that the deceased had died a few hours after the accident. For the few hours she was alive, the deceased must have endured immense pain and suffering. I am therefore not persuaded that an award of KShs.30,000 for her pain and suffering before she succumbed to her injuries was excessive or exorbitant. The award was reasonable in the circumstances of this case and it is hereby upheld.

17. Turning to the award for loss of dependency, the respondent has conceded that the multiplicand that ought to have been used in the computation of the award was the deceased's net salary of KShs.47,607 not the KShs.60,000 adopted by the trial court. The only outstanding issue then for my determination is whether the trial court erred in using a multiplier of 14 years and a dependency ratio of 2/3rds in computing the award for loss of dependency.

18. I have read the deceased's letter of appointment dated 27th February 2012. I have not come across any clause in that letter which provides that the deceased had been employed by *Livewell Kenya Limited* for a renewable contract of three years as stated by Mr. Mukasa in his submissions. Clause 15 which is titled **“Contract Variation”** provides that:

“This contract will be reviewed every year but either party may terminate this arrangement by giving one month notice.”

19. I am inclined to agree with the interpretation given to the above clause by learned counsel *Mr. Ombati*. It is my finding that the clause did not mean that the deceased's contract was renewable after every three years as submitted by learned counsel *Mr. Mukasa*. I share *Mr. Ombati's* view that this clause meant that the deceased's terms of employment would be renewed every year but any party wishing to terminate the contract could do so by giving the other party one month's notice.

20. In settling on a multiplier of 14 years, the learned trial magistrate noted that the deceased was 45 years of age at the time of her death and that everything remaining constant, she would have worked till she attained the usual retirement age of 60 years. I have noted from the death certificate tendered in evidence by PW 3, the deceased's mother that indeed the deceased was 45 years at the time of her demise but even assuming that she was in good health and that she would have lived to work for many more years had it not been for her untimely death, there is no guarantee that she would have worked till she reached the retirement age. The multiplier adopted by the learned trial magistrate seems to suggest that he did not take into account the vagaries of life which may have militated against the possibility of the deceased working for 14 out of the 15 years which were left to her retirement age. In my view, taking into account the vicissitudes of life, I find that a multiplier of 13 years would have been more reasonable in the circumstances of this case. I consequently set aside the multiplier of 14 years adopted by the learned trial magistrate and substitute it with a multiplier of 13 years.

21. As for the dependency ratio, dependency is a question of fact which must be determined on the basis of the facts of each case. In this case, there is evidence from PW 3 that though the deceased was not married, she had a young daughter who was attending a private school (Star Shake Academy) and that she used to financially support the child, herself and her husband who was also a retiree. Her claim that the deceased used to send KShs.35,000 per month for their use was not dislodged in the course of her cross examination by the defendants.

In the premises, given the evidence on record, I cannot fault the learned trial magistrate for adopting a dependency ratio of 2/3rds.

In view of the foregoing, the award for loss of dependency will work out as follows:

KShs.47,607x12x 2/3 x13= KShs.4,951,128

22. Having determined the amount of general damages that should have been awarded to the respondent given that the award for loss of expectation of life was not disputed, I now wish to address the complaint regarding the award of special damages. The special damages were in respect of burial expenses incurred by the deceased's estate when preparing for her interment. The general rule is that special damages must be specifically pleaded and strictly proved. A perusal of the plaint shows that special damages in the sum of KShs.246,361 were pleaded in paragraph 10 of the plaint. PW3 tendered a bundle of receipts in support of this claim in the course of her evidence. The appellant has contended that the special damages were not strictly proved as the receipts produced in support thereof did not bear revenue stamps.

23. To resolve the issue regarding whether or not the claim for special damages was proved to the standard required by the law, I will do no better than to reproduce the holding by my sister *Hon. Janet Mulwa J* in the authority cited by the respondents namely **Benjamin Muela Kimono V David Kibet Rono, [2015] eKLR** in which she held that:

“Under the Stamp Duty Act, Chapter 480 Laws of Kenya, it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalised for omissions of the receiver. I am guided by the cases *Benedetta Wanjiku Kimani V Chanaw Cheboi & Another, HCCC No 373 of 2008* and *Irene Ngombo Mshingo V Miriam Kadogo, (2000) KLR* where the Learned Judges held that a document does not cease from being admissible for lack of affixation of a revenue stamp in the latter case the court proceeds to admit payment receipts issued from Kenyatta national Hospital without Revenue stamp being affixed thereon.”

I entirely agree with the above holding and find that the learned trial magistrate was correct in his finding that the fact that the aforesaid receipts did not have revenue stamps did not make them inadmissible in evidence. It is thus my finding that the special damages pleaded were strictly proved. I do not therefore have any basis for interfering with the trial court's award of special damages in the sum of KShs. 246,361.

24. Regarding the claim that the trial court did not have pecuniary jurisdiction to award the amount of damages that were awarded to the respondents in this case, a reading of *Section 7* of the *Magistrates Courts' Act of 2015* leaves no doubt that the learned trial magistrate had the requisite jurisdiction to make the contested awards. The provision provides that:

“(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

- a. twenty million shillings, where the court is presided over by a chief magistrate;***
- b. fifteen million shillings, where the court is presided over by a senior principal magistrate;***
- c. ten million shillings, where the court is presided over by a principal magistrate;***
- d. seven million shillings, where the court is presided over by a senior resident magistrate; or***
- e. five million shillings, where the court is presided over by a resident magistrate.***

The impugned judgment in which the respondents were awarded a total sum of KShs.7,096,361 was delivered on 3rd December 2015 and therefore, the issue of the law operating retrospectively or otherwise does not arise. Consequently, the submissions by *Mr. Mukasa* on the trial court's alleged lack of jurisdiction to make the awards made in favour of the respondents must fall by the way side as they cannot be sustained.

25. The upshot of this judgment is that the awards made by the trial court in the sum of KShs.30,000 and KShs.100,000 for pain and suffering and loss of expectation of life respectively as well as the award for special damages in the sum of KShs.246,361 remains undisturbed. The award for loss of dependency has been reduced to KShs.4,951,128. As conceded by learned counsel *Mr. Ombati*, the award of KShs.100,000 for loss of expectation of life ought to be deducted from the total amount payable to the respondents and when this is done, the total amount of general damages payable to the respondents will be KShs.4,981,128.

26. In the end, the appeal partially succeeds to the extent specified above. In the result, the judgment of the trial court is hereby set aside and is substituted with a judgment of this court in favour of the respondents against the appellants jointly and severally for the total sum of KShs.4,981,128 in general damages and special damages in the sum of KShs.246,361. The award of both general and special damages will attract interest at court rates from the date of judgment of the lower court until payment in full.

27. Given the outcome of the appeal, the respondents are awarded costs in the lower court but each party will bear their own costs of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of February, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Amulyoto holding brief for Mr. Mukasa for the appellants

Miss Awori holding brief for Mr. Kefa Ombati for the respondents

Mr. Salach: Court Assistant