



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 107 OF 2017

ROBERT BOSIRE OMBIRO(Suing as Personal Representative and

administrator of the estate of DICKSON BOSIRE SAMBA (Deceased).....PLAINTIFF

VERSUS

CALEB CHERUIYOT ROTICH.....DEFENDANT

(Being an appeal arising from the judgment and decree by Hon. R. Odenyo in Chief Magistrate's Court at Migori Civil suit No. 63 of 2016 delivered on 30/10/2017)

JUDGMENT

1. There are two issues for determination on quantum of damages in this appeal. They are whether the monthly income of Kshs. 30,000/= was without any basis and ought to be interfered with and whether a dependency ratio of 1/3 ought to be applicable instead of 2/3.
2. The genesis of this appeal is that on 25/05/2014 one **Dickson Bosire Samba** (hereinafter referred to as **'the deceased'**) was involved in a road traffic accident at Lwala area along Kisii-Migori Road and sustained fatal injuries. The deceased was driving motor vehicle registration number KBM 103Y make Toyota Allion. The Respondent herein who was the father to the deceased then filed **Migori Chief Magistrate's Civil Case No. 711 of 2015** (hereinafter referred to as **'the suit'**) against the Appellant herein who was the owner of the offending motor vehicle registration number KBM 103Y make FAW Lorry claiming *inter alia* damages under the Fatal Accidents Act and the Law Reform Act.
3. Liability in the suit was agreed by consent of the parties at 30% and 70% in favour of the Respondent. The court then assessed damages and it is the resultant assessment which prompted this appeal.
4. The Appellant raised six grounds of appeal in their Memorandum of Appeal dated 13/11/2017. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.
5. The Appellant mainly challenged the multiplicand and the dependency ratio. He relied on the decisions of **David Kajogi M'mugaa v Francis Muthomi [2012] e KLR**, **Petrocity Enterprises (U) Ltd v Roseline Sikudi suing as legal rep of the estate of Pascal Ngadi (Deceased) & 2 others [2017] e KLR** and **Ursula Mulandi v Kyalo Mutunga & others [2017] e KLR** in support of the submission.
6. The Respondent supported the impugned decision. He submitted that the Appellant had not demonstrated that the trial court erred in making any of the awards and that the awards were reasonable and fair. **The Respondent made reference to the decisions of Toyota (Kenya) Limited v Express (Kenya) Limited, Selle v Associated Motor Boat Company Ltd, (1968) EA 123, 126 paras H - 1, Benjamin Onkoba Nyaachi & Another v Victoria Insurance Brokers (2010) e KLR, John Wamae & 2 Others v Jane Kituku Nziva & Another, MotEX Knitwear Limited v Gopitex Knitwear Mills Limited (2009) e KLR, Sosphinaf Gatiku Ndolo v Daniel Ngang'a Kanyi, PaulKiwanjani Hardware Ltd & Another v Nicholas Mule Mutinda, Sokoro Plywood Limited & Another v Njenga Wainana (2007) e KLR, Ben Kiptm Ego v Joseph Karanja (2009) e KLR, Siyaram Enterprises & Another v Samuel Nyachani Nyachani (2015) e KLR, and Jacob Ayiga Maruja & Another v Simeane Obayo in urging this Court to dismiss the appeal.**
7. As the appeal hinges on assessment of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277.**)
8. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services** (supra) discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

“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 by the former Court of Appeal of Eastern Africa 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.”

9. This position was restated by the Court of Appeal in the case of Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101 and so recently in the case of Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.

10. I will now deal with whether the multiplicand of Kshs. 30,000/= was without any basis and ought to be interfered with. There is consensus that the deceased was a driver in Nairobi and in fact he died while driving motor vehicle registration number KBM 103Y. There is also no dispute that no documentary evidence was adduced in support of the income of the deceased. In such instances all is not lost, the law is by now well settled. A Court of Law in pursuit of justice must appreciate the fact that there are many people in our society today who are illiterate and do not have documentary evidence in proof of their incomes, but all the same they earn a living. (See Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited Court of Appeal at Nyeri Civil Appeal No. 22 of 2014 (2015) eKLR among others). A Court therefore ought to revert to the applicable Regulation of Wages Order or to a global figure in appropriate cases for instance when the deceased is a minor among other instances.

11. As the deceased was an adult and a driver, then in the absence of any formal evidence of income a Court can safely revert to the appropriate order. In this case the appropriate category would be The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197) which was applicable in 2014 since the deceased died in 2014. Since the Driving Licence for the deceased was not produced in evidence, the class of vehicles the deceased was authorized to drive is unclear. However, as the deceased was involved in the accident while driving a Toyota Allion I will take it that he was authorized to drive medium-sized vehicles. The deceased would then fall under **Category (h) Column 2** thereof which provided for the wages of such drivers. The monthly income inclusive of house allowance was Kshs. 23,972/=. The trial court made an award of Kshs. 30,000/= on an assumption that drivers are usually paid in the region of the said sum. As I have said in several decisions such approach is likely to lack certainty, uniformity and predictability of the law. The trial court therefore, and with respect, erred in not basing his assumption on any documentary evidence or the Regulation of Wages (General) (Amendment) Order, 2013 since this was a clear case falling under the said Order in the absence of any documentary proof of earnings. The award of Kshs. 30,000/= is hereby interfered with and substituted with that of Kshs. 23,972/=.

12. On the dependency ratio, there is evidence that the deceased took care of his father and his child although he was not married. It is therefore possible that the deceased used most of his money in taking care of his family. The dependency ratio adopted by the trial court cannot be faulted.

13. Having dealt with the twin issues in this appeal and as I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

14. I therefore find that the appeal succeeds partly and to the extent of reviewing the multiplicand from Kshs. 30,000/= to Kshs. 23, 972/= monthly. The other awards remain as made by the trial court. Each party to bear its own costs of the appeal.

15. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ouma Otieno instructed by the firm of Messrs. O. M. Otieno & Company Advocates for the Appellant.

Mr. Ochoki instructed by the firm of Messrs. Ochoki & Company Advocates for the Respondent.

Evelyn Nyauke – Court Assistant