



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 159 OF 2016

MONICA NJERI KAMAU.....APPELLANT

(Suing as the legal administrator of the Estate of the

Late **SAMUEL KAMAU NJERI**)

VERSUS

PETER MONARI ONKOBA.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Court Civil Case No. 613 of 2016 by Hon. J. B. Kalo, C.M. delivered on 11th day of November, 2016

J U D G M E N T

INTRODUCTION

1.This appeal arise from civil suit filed in the subordinate court by the appellant against the respondents. The appellant sought general and special damages for the death of **Samuel Kamau Njeri** (Deceased) from an accident involving the 2nd defendant motor vehicle registration No. KBE 532U driven by the 1st respondent on 8th September 2015. Parties recorded consent on liability at 85%:15% in favour of the appellant. The appellant was awarded a global figure of Kshs 500,000 as damages.

2. The appellant is aggrieved by the trial magistrate's decision and has filed this appeal on the following grounds:-

i. The Learned Magistrate erred in law and in fact in awarding a global sum of Kshs.500,000/= as compensation in violation of the provisions of the Law Reforms (Miscellaneous Provisions) Act and Fatal Accidents Act in the assessment on the quantum of damages.

ii. The Learned Magistrate erred in law and in fact in misdirecting himself that the Appellant (Plaintiff) had not produced any documents to prove the age of the deceased but the Appellant (Plaintiff) had produced in evidence a certificate of death P/Exh.4 clearly showing the age of the deceased as 39 years old.

iii. The Learned Magistrate erred in law and in fact in misdirecting himself in holding that the Appellant (Plaintiff) had not proved dependency yet there was on record uncontroverted documentary evidence of the birth certificates P Exh.5(a) and 5(b) of the minor children of the deceased who are now orphans.

iv. The Learned Magistrate erred in law and in fact in misdirecting himself by failing to apply the minimum statutory wage of a watchman in determining multiplicand in the absence of sufficient documentary evidence on the earnings of the deceased.

v. The Learned Magistrate erred in law and in fact in failing to make a determination on special damages as pleaded and proved by documentary evidence tendered by the Appellant as Exhibit P Exh.1, 2(a), 2(b), 2(c), 2(d) and (e).

vi. The Learned Magistrate failed to appreciate the totality of the evidence before him on assessment of quantum of damages in not considering the Appellant's (Plaintiff) submissions and in particular the authorities relied upon by the Appellant (Plaintiff) in her submissions.

APPELLANTS SUBMISSIONS

3. Appellant's counsel confirmed that parties agreed and recorded consent on liability at 85:15 percent in favour of the appellant. He restated

grounds of appeal. Counsel urged court to re-asses, review and/or revise the award.

4. Appellant argued the four ground together as they are interrelated. Counsel submitted that the finding that the appellant did prove the deceased's age and whether he was working as a watchman is erroneous and that the trial court failed to appreciate that the appellant produced a death certificate which shows the deceased's age as 39 years. That the court failed to take judicial notice of the fact that before death certificate is issued, National Identity Card has to be surrendered to registrar of births and deaths. Appellant submitted that the court failed to determine and find issue of multiplier and urged the court to find a multiplier of 21 years.

5. On dependency ratio, counsel for the appellant submitted that it was clearly stated that the suit was brought on behalf of the appellant as the mother and two minors aged 9 and 8 years. He submitted that evidence indicate that the deceased's wife had passed on but he had 2 children and a mother who relied on him.

6. Appellant submitted that birth certificates of the children produced in court confirmed that the deceased was a family man who had two children to take care of. Upon his death, the burden of taking care of his children was left to his mother the appellant herein who also relied on him for support as is common in most African families.

7. Counsel for the appellant further submitted that the death certificate clearly show the occupation of the deceased as that of a watchman/guard. He submitted that it is not uncommon to find watchmen working without letters of appointment especially those who worked for individuals as opposed to security firms. Counsel further submitted that the court should have used minimum wage in a situation where no payslip is produced.

8. On loss of expectation of life, the appellant submitted that the deceased died at young age of 39 years and had more years to live if not for the accident. He submitted award of Kshs 150,000 for loss of expectation of life was reasonable.

9. On multiplier appellant urged court to adopt a multiplier of 21 years, as he would have worked up to 60 years. That the minimum wage of a watchmen at the time the deceased died was Kshs 9,024.15 and net would be Kshs 8,500 after statutory deductions. Counsel submitted that the appellant had urged the lower court to use a multiplicand of Kshs 8,000, which would add loss of dependency at Kshs 1,244,000.

RESPONDENTS SUBMISSIONS

10. The respondent confirmed that it was difficult to ascertain income and age from evidence and the facts of the case therefore did facilitate application of multiplier approach in assessment of damages for loss of dependency.

Counsel cited the case of *Mwanzia Ngalali Mutua Vs kenya Bus services (Msa) Ltd & Another*, where the court held as follows:-

“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 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.”

11. The respondent submitted that multiplier approach was rightfully abandoned in this case and urged the court not to allow the appeal.

ANALYSIS AND DETERMINATION

12. I have considered submissions by both parties herein and perused the court record. Issue for determination are as hereunder:-

Whether the trial magistrate in awarding a global figure under loss of dependency.

13. The appellant's argument is that the age was proved and in respect to multiplier and multiplicand the court was right in adopting the minimum wage; that the deceased who was relied on by family and was expected to work for the next 21 years if not for the accident leading to his death. The respondent argued that the appellant failed to prove age and that the deceased worked as a watchman.

14. This being first appellant court I am required to re-evaluate evidence adduced before the trial court and make an independent determination.

15. On perusal of the court record, I note that the appellant produced the deceased's death certificate. The death certificate indicate age as 39 years. The practice is for identity card to be surrendered before death certificate is issued. The age in the death certificate must have been obtained from the identity card surrendered. It is not therefore correct to say that age was not proved.

16. In so far as the deceased's occupation is concerned, the death certificate also indicate watchman. I however agree with respondent that that needed further independent prove. The registrar of births and deaths may have obtained the information from the relative who was collecting the death certificate. There is no confirmation for that. There is however, no indication that the deceased was unable to engage in any form of income earning activity to support his family. Even if he never worked as a watchman, he is expected to engage in any other form of work to support his family.

17. In a situation where there is no sufficient prove of employment it would be appropriate to adopt minimum. I therefore find that the trial magistrate erred in awarding a global figure.

18. In so far as the multiplier is concerned, there are chances that the deceased would not work up to the official retirement age of sixty due to uncertainties of life. Unskilled workers tend to engage in heavy work which may contribute in reducing their life span. In respect of the deceased herein, I will apply a multiplier of 11 years and multiplicand of minimum wage in the year 2015 which is Kshs 9,024.15. My finding under loss of expectation of life and award as hereunder:-

$$9,024.15 \times 11 \times 12 \times 2/3 = 794,112.00$$

19. In respect of special damages, record show the appellant produced receipts for kshs 5000 +3500+7000+2800+8000 +20,000 totalling 49,300. Special damages pleaded in the plaint are 45,7000. The trial court ought to have awarded special damages pleaded and proved.

20. No award was granted for pain and suffering nor loss of expectation of life. No explanation was given for that.

21. Evidence adduced show that the deceased died instantly. There is no doubt that he suffered pain and that there was expectation of life ahead, which was cut short by the accident herein. Award under the two headings should have been granted. I will proceed award kshs 20,000 under pain and suffering and Kshs 100,000 for loss of expectation of life.

22. From the foregoing, I do set aside judgment entered by the trial magistrate and enter judgment as hereunder:-

- 1. Pain and suffering.....Kshs 20,000
- 2. Loss of expectation of lifeKshs 100,000
- 3. Loss of dependency $9,024.15 \times 11 \times 12 \times 2/3$...Kshs.794,112.00
- 4. Special damages.....Kshs.45,700.00
- Total.....Kshs.959,812.00
- Less 15 % (143,971.80).....Kshs.815,840.20

FINAL ORDERS

- i. I hereby set aside judgment delivered on 11th day of November 2016 by J.B. Kyalo CM .
- ii. Enter judgment for the plaintiff/Appellant against the defendant/respondent for Kshs 815,840.20.
- iii. Costs and interest to Appellant from the date of delivery of this judgment.

Judgment Dated, signed and delivered at Nakuru this 7th day of March 2019.

.....

RACHEL NGETICH

JUDGE

In the Presence of:-

Schola Court Assistant

Mutai Counsel for Appellant

Ms. Ayuma Counsel for Respondent