



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R.MWONGO, J)

CIVIL APPEAL NO. 69 OF 2016

PETER KIONGO.....1ST APPELLANT

MICHAEL MUTHII BUNDI.....2ND APPELLANT

VERSUS

NJOKI KARIU WANYANGE (Suing as the legal Administrators

of the Estate of JOAN WAMBUI NGIGI).....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon E. Kimilu SRM (as she then was) delivered on 4th October, 2015 in Naivasha CMCC No 182 of 2015)

JUDGMENT

1. The deceased died after an accident on 22nd November, 2012 along Kinangop Naivasha road. The undisputed evidence is that he died instantly, and was aged 44years. He was survived by his wife, Njoki Kiarie, and four children. His wife was the only witness in the suit in the lower court; as the defence having availed no witnesses. . Liability was agreed by consent at the ratio 70%:30% in favour of the plaintiff (respondent herein).

2. This appeal challenges the quantum of damages awarded by the trial court. The award given was as follows:

Pain and suffering	Kshs	30,000/=
Loss of expectation of life	Kshs	100,000/=
Loss of dependency	Kshs	1,800,000/=
Special damages	Kshs	26,050/=
	Kshs	1,956,050/=
Less 30%	Kshs	<u>586,815/=</u>
Total	Kshs	1,369,235/=

3. The appellant has challenged the award on each head. In particular, issue is taken with the fact that the deceased's income was not pleaded and that the trial magistrate found that the deceased was a technician which was not proved. In accordance with **section 78** of the **Civil Procedure Act**, I shall re-evaluate the evidence and re-assess the damages under each head.

4. It is trite that the duty of this court as the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not itself have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, **Peters v Sunday Post Ltd (1958) EA 424**. Ordinarily, an appellate court will not interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambusu [1982 – 1988] 1 KAR 278**].

Pain and suffering

5. At the trial, the plaintiff proposed Kshs 50,000/= and the defendant proposed Kshs 10,000/=. Appellant cited two authorities – one for 2009 and the other a 1998 decision – in which Kshs 10,000/= was awarded. Given the age of the authorities, I see no reason to interfere with the trial magistrate’s award of 30,000/=.

Loss of expectation of life

6. On the basis that the deceased died at the age of 44 years, the plaintiff at trial proposed an award of Kshs 130,000/= and the defendant Kshs 80,000/=. The trial magistrate relied on **Nancy Ruguru Trupahs v James Mburu Karanja [2007]eKLR**.

7. The appellant did not challenge the award in their submissions and did in fact cite the case of **Charity Mapenzi & Another v National Water Conservation and Pipeline Corporation [2005] eKLR** in respect of the issue of multiplicand. There the award for loss of expectation of life was Kshs 100,000/=. Accordingly I will not disturb the lower court’s award on this headed.

Loss of dependancy

8. This is the head which has raised the greatest dispute. The trial court took the evidence of the witness that the deceased worked as an electrical technician despite this fact not having been pleaded. It is, of course true that the defendant did not provide any evidence at all to counter that availed by the plaintiff.

9. In my view, the trial court was not entitled to accept the evidence of PW1 as gospel truth especially in respect of income without any proof where the fact had not been pleaded to avoid an ambush on the defendant. in evidence in chief, PW1 testified:

“My husband worked with various companies like Homegrown in 1998. I have a letter to confirm his employment. It’s on salary review to Ksh 9,000/=(MFI 4) Approximately, he used to give me Kshs 23,000/= for rent, food and all basic needs. He was working with Logonot Horticulture...I can’t tell his salary at Logonot Horticulture...”

10. In cross examination PW1 said:

“My husband was a technician. I have no professional certificates for my husband. I am not sure of his monthly income at the time of his untimely death”

11. The trial magistrate determined that the deceased earned Kshs 23,000/= as an electrical technician, reduced it without explanation to Kshs 15,000/=. and used that income figure to calculate the loss of dependancy. This was despite the witness stating that she did not know her husband’s income, and the contradictory evidence of Kshs 23,000/= given to her whilst also testifying to a salary review of Kshs 9,000/=. Based on the evidence adduced, I do not think the trial magistrate was entitled to reach that conclusion.

12. It is now settled that the absence of papers and clear evidence of income earned does not prevent a court from making a determination based on income. In **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR** where Asike-Makhandia J (as he then was) stated:

“In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005”

13. In **Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others [2014] eKLR** Majanja, J. stated:

“Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on “municipal rates.” The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle.

14. I therefore agree with the appellant that the trial court should have relied on the **Basic Minimum Consolidated Wages (Agricultural Industry) (Amendment) Order June 2012** to arrive at an incontrovertible income assessment of the deceased. I shall adopt the Order and a multiplicand of Kshs 7,915.90 being the minimum wage under the Order.

15. As to the multiplier, there is no reason that the deceased would not have worked up to the age of 55 then retire or be retired like any civil servant. I shall adopt the retirement age of 55, giving a multiplier of eleven (11) years. Thus, the calculation for loss of dependency shall be as follows:

Kshs 7,915.90 x 12 x 11 x 2/3 = Kshs 696,599.20

Special Damages

16. The award by the lower court was not contested and I see no reason to interfere with it.

