



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 116 OF 2012

BEATRICE WANJIKU MAINA (Appealing as the

Legal Representative of the Estate of

JAMES MAINA NDOGO).....APPELLANT

VERSUS

MWANGI WILSON.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon. Wilbroda Juma, Chief Magistrate dated the 17/10/2013 in Nyeri CMCC No.9 of 2011; the Appellant herein sued the Respondent for damages arising out of an accident that occurred on the 7th May, 2010; the appellant’s husband James Maina Ndogo (now deceased) was travelling as a passenger in motor vehicle registration number KAR 212A Toyota Hiace Matatu when the Respondent and or his agent carelessly drove motor vehicle registration number KAL 463Z along the Nyeri –Karatina road around Kanyama area causing it to lose control and to collide with the one the deceased was travelling in; the accident led to the demise of the Appellants spouse;

2. After a full hearing, the trial court found that the Appellant had proved her case and judgment was entered in favour of the appellant; and an award was made as set out hereunder:

Pain and suffering.....Kshs.10,000/-

Loss of expectation of life.....Kshs.100,000/-

Loss of dependency.....Kshs.2,635,200/-

Special damages.....Kshs.75,000/-

TOTAL.....Kshs.2,820,200/-

3. The appellant being dissatisfied with the trial Court’s decision filed this appeal; the appellant listed only one (1) ground of appeal in her Memorandum of Appeal dated the 25th October, 2012 which is as summarized hereunder;

(i) The learned Magistrate erred in law and fact in adopting an erroneous multiplicand in computing the loss of dependency; thus making an award which was excessively low;

4.The parties agreed to dispose the appeal by way of written submissions; the Appellant is the only party that complied and filed the submissions on the 6/12/2018; the Respondent’s failure to comply means that the Appellants appeal is unchallenged and uncontroverted; hereunder is a summary of the submissions;

APPELLANTS SUBMISSIONS

5. The appellant submitted that she was aggrieved with the computation of damages for loss of dependency under the provisions of the Fatal Accidents Act; at the trial in the lower court the deceased’s pay-slip for the month of April, 2010 was tendered as evidence; that it indicated that the deceased was a earning a net salary of Kshs.41,695/- and this is the figure the trial court ought to have used in calculating the

damages;

6. Instead the trial court erroneously based the loss of dependency on the deceased's basic salary which was 36,550/- and after taxation this figure was reduced to Kshs.27,450/-; the trial courts erroneous calculation was as follows;

27,450/-(monthly income) x 12(years) x 12(months) x 2/3 = 2,635,200/-;

7. The appellants contention is that the trial court ought to have deducted PAYE taxation in the sum of Kshs.9200/- from the gross salary of Kshs.50,895/- so as to arrive at a net figure of Kshs.41,695/-; the multiplier and the ratio are uncontested and therefore the proper calculation ought to have been as follows;

41,695/- x 12 x 12 x 2/3 which makes a total of Shs.4,002,720/-

8. The authorities the appellant relied on in support of her claim are **Stella Kanini Jackson & Another vs Kenya Power HCCC No. 338 of 2010 at Mombasa and James Gakinya Karieny & Another HCCC No.91 of 2014 at Nairobi.**

9. The appellant urged the court to allow the appeal; and it had already made an award of Kshs.2,635,200/- and the respondent be given credit for the said sum and be ordered to pay the difference in the sum of Kshs.1,367,520/- with interest thereon from the date of judgment plus costs;

ISSUES FOR DETERMINATION

10. After perusing the court record and reading the appellants written submissions this court has framed only one issue for determination; which is whether the multiplicand was based on wrong principles of law and fact;

ANALYSIS

11. In the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** the Court of Appeal held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

Whether the multiplicand was based on wrong principles of law and fact:

12. Normally an appellate court will not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; and for this Court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions; in the case of **Butt vs Khan (1977) 1KAR Law JA** stated that:-

“An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low.”

13. Similarly in the case of **Kenya Breweries Ltd Vs Saro [1991] eKLR** it was held that,

“...It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred....”

14. The Court of Appeal also held in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (supra):**

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

15. Upon perusal of the court record the trial courts award in favour of the appellant is made out as follows;

Pain and suffering.....Kshs.10,000/-
Loss of expectation of life.....Kshs.100,000/-
Loss of dependency.....Kshs.2,635,200/-
Special damages.....Kshs.75,000/-
TOTAL.....Kshs.2,820,200/-

16. The record shows that the appellant adduced evidence to prove the deceased's earnings; she stated that the deceased was a Superintendent

of Police then based at Kadonga; he used to earn a monthly salary of Kshs. 50,895/- and produced two pay-slips for the months March, 2010 (**PEXh.4A**) and April, 2010 (**PEXh.4B**) to prove the deceased's earnings; this was the evidence adduced in the lower court; from the evidence adduced the trial court adopted the basic salary as the multiplicand and made the following calculation in its judgment;

“His basic salary was 36,650/- the taxed amounts was shs.9,200/- giving a difference of shs.27,450/-. On loss of dependants (sic), using a multiplication of 12 the award would be 27,450 x12 x2/3 = 2,635,200/=”

17. No authorities were cited by the trial court to support its conclusion; the appellant found this figure unacceptable and therefore proceeded to appeal against this determination; it was the appellant's contention that in assessing damages under the Fatal Accidents Act the trial court adopted the wrong principle in determining the multiplicand and therefore arrived at a wrong determination and therefore the award for loss of dependency was inordinately low;

18. One of the key principles in assessing damages under the Fatal Accidents Act is for the court to determine the proportion of the net income which would have been made available for the dependants; this is what is known as the multiplicand; in determining the multiplicand the important figure is the deceased's basic pay plus all the allowances which then equals to the gross earnings which is then subjected to taxation so as to arrive at the net earnings;

19. In this instance upon perusal of the deceased's pay-slips '**PEXh.4A**' and '**PEXh.4B**' both read as follows;

Basic Salary.....Kshs.36,650.00
Rental House Allowance.....Kshs.8000.00
Medical Allowance.....Kshs.1245.00
Police Risk Allowance.....Kshs.5000.00
Total earnings.....Kshs.50,895.00
PAYE.....Kshs.9,200.00

20. From perusal of the judgment it is noted that the trial court used the basic salary of shs.36,550/- as opposed to the gross salary of shs.50,895/-; the figure the trial court derived after deducting the tax liability of shs.9,200/- was the net amount of shs.27,450/- whereas if the gross salary had been considered and subjected to taxation the net earnings would have been in the sum of shs.41,695/-;

21. This court reiterates that the correct multiplicand is derived from the gross earnings less taxation; therefore this amount would be Kshs.50,895/- less Kshs.9,200/ which makes the net earnings Kshs.41,695/- and using this multiplicand the award for loss of dependency would then be;

$41,695 \times 12 \text{ (years)} \times 12 \text{ (months)} \times 2/3 = 4,002,720/=$

22. It is therefore evident from the proceedings that the trial magistrate proceeded on wrong principles of law and fact and the award made for loss of dependency is found to be inordinately low; this court is therefore satisfied that there are good reasons for this court to interfere and disturb the trial courts finding on the deceased's income;

23. This ground of appeal has merit and is hereby allowed.

FINDINGS AND DETERMINATION

24. The appeal on loss of dependency is found to have merit and it is hereby allowed; in the circumstances the judgment of the lower Court in the sum of Kshs.2,820,200/= is hereby set aside and substituted with a judgment in the amount of Kshs.4,187,720/- made out as follows;

- (i) Pain and suffering.....Kshs.10,000/-
- (ii) Loss of expectation of life.....Kshs.100,000/-
- (iii) Loss of dependency..... Kshs.4,002,720/-
- (iv) Special damages.....Kshs.75,000/-
- (v) TOTAL.....Kshs.4,187,720/-

25. The appellant shall have interest thereon at court rates until payment in full.

26. The appellant shall have costs of this appeal.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 4th day of April, 2019.

HON.A.MSHILA

JUDGE