



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 31A OF 2018

JOSEPH MWANGI KIARIE.....1ST APPELLANT

LUCAS ODHIAMBO ODHIAMBO.....2ND APPELLANT

VERSUS

MONICAH LUSI OKONGO (*suing as personal representative of the estate of*

THOMAS OTEINO ODINO.....RESPONDENT

[Appeal from a Judgment and decree of the Chief Magistrate’s Court at Kisumu

Hon. Ndombi dated the 16th day of April 2018 in Civil Case No. 401 of 2013]

JUDGMENT

The Respondent, **MONICA LUSI OKONGO**, was the wife of **THOMAS OTIENO ODINO**, now deceased.

1. Thomas Otieno Odino died in an accident which occurred on 10th April 2013, along the Awasi-Ahero road.
2. At the time of the accident, Thomas was a pillion passenger, who was travelling aboard a motor cycle Registration No. **KMCR 415T**.
3. On 16th October 2017 the parties recorded a Consent Order on liability, pursuant to which the Plaintiff conceded 20% liability, whilst the Defendant conceded 80% liability.
4. On 16th April 2018 the learned trial magistrate delivered her Judgment in which the compensation was awarded as follows;

“1. General Damages

(i) Pain and Suffering Kshs 20,000.00

(ii) Loss of Expectation of life..... Kshs 120,000.00

(iii) Loss of Dependency

(Kshs 16,602.80 x 5 x 12

x 2/3 Kshs 664,112.00

2. Special Damages

Coffin Kshs 6,500.00

Police Abstract Kshs 50.00

Kshs 810,662.00

Less 20% Contributory Negligence Kshs 162,132.00

Balance Kshs 648,529.60

5. In the appeal to the High Court, the Appellants raised the following issues;

(i) The trial court was not guided by precedents from previous decisions;

(ii) The trial court did not follow the legal principles that govern Dependency;

(iii) The Award was not supported by the evidence adduced;

(iv) There was a duplicity in the awards, as the court did not take into account the award

under the Fatal Accident claim, when calculating the award under the Law Reform

Act;

(v) The sums awarded were excessive.

6. The Plaintiff disclosed that the deceased was 56 years old at the time of his death. He was described as having been a person who enjoyed good health and who lived a happy and vigorous life.

7. At paragraph 7(a) of the Plaintiff, it is asserted that the deceased was a driver by profession and that he was employed by a contractor of Kenya Power & Lighting Company Limited.

8. The further assertion in the Plaintiff was that the deceased used to earn Kshs 500/= every day, which added up to Kshs 15,000/= per month.

9. The Plaintiff called 3 witnesses.

10. **PW1, MONICA LUSI OKONGO**, is the wife of the deceased, Thomas Otieno Odino.

11. She testified that she incurred funeral expenses, including the purchase of;

(a) Coffin Kshs 6,500.00

(b) Two Bulls Kshs 7,570.00

(c) Maize – 2 ½ bags

12. **PW1** also said that it is the deceased who used to pay fees for his children.

13. She told the court that;

“At the time of his demise he was a Counsellor’s driver.”

14. Later, during cross-examination, **PW1** said that she did not have any other document to show that the deceased was employed, save for his Driving Licence.

15. After the Plaintiff closed her case, the Defendant did not call any evidence.

16. In her submissions the Plaintiff stated thus, in relation to the job which the deceased was said to have been doing just before he was involved in the fatal accident;

“The deceased, at the time of his death, was a driver and his income could not be traced.”

17. Nonetheless, the Plaintiff cited the case of **WESLEY KIPYEGON MUTAI (Suing as personal representative of the Estate of CHARLES KIPKOECH MUTAI (Deceased) (Kericho) HCCC NO. 41 OF 2005**, as authority for the proposition that when there was not proof of income, the court would calculate compensation for loss of dependency, based on the Minimum Wage.

18. The learned trial magistrate accepted the Plaintiff's submissions in that respect, and computed the compensation as follows;

"Kshs 16,602.80 x 5 x 12 x 2/3 = 644,112/="

19. In this appeal, the court has been urged to find that the trial court erred by ignoring the pleading in the Plaint, which had indicated that the deceased was earning Kshs 500/= per day.

20. It is clear from the evidence that the Plaintiff did not lead evidence to prove that the deceased was earning Kshs 500/= daily.

21. And even assuming that the deceased had been earning Kshs 500/= per day, I hold the considered view that he would not have been earning Kshs 15,000/= every month, because that would have implied that he never ever rested on any single day.

22. Furthermore, I find that there is a discrepancy between paragraph 7(a) of the Plaint and the evidence tendered.

23. On the one hand, it was pleaded that the deceased used to work for a contractor of Kenya Power & Lighting Company Limited, whilst, on the other hand the evidence adduced indicated that the deceased was working for a Counsellor.

24. In effect, the evidence made available did not prove the case as pleaded.

25. The question that then arises is whether or not, in the circumstances where the evidence did not prove the case as pleaded, the court should disallow the claim for compensation.

26. I take the position that before the court can be called upon to apply the Minimum Wage as a basis upon which to calculate the dependency, it is important that there be proof that the deceased was earning a livelihood.

27. If a person was not providing for his/her family, they cannot be said to have been depending on him/her during his/her lifetime.

28. In this case, the wife of the deceased told the court that he used to pay school fees for his school-going children.

29. She also stated that after the deceased passed away, some of the children were sent away from school due to non-payment of fees.

30. Although the children had subsequently returned to school, the widow said that she was having serious challenges in raising money to sustain the payment of the fees.

31. In the circumstances, although there was no evidence which proved that the deceased was employed, I am persuaded that the deceased used to provide for his family whilst he was alive.

32. In the case of NELSON RINTARI Vs CMC GROUP LTD [2015] eKLR the court held as follows;

" I agree that a wrong doer must accept the victim as he finds him. The Respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted, this would do a lot of injustice to many Kenyans who have invested in the informal sector and who do not worry about keeping books of accounts....."

33. In this case, the evidence concerning the fact that the deceased used to provide for his family, was uncontroverted.

34. Therefore, although the said evidence does not prove the income which the deceased was earning, or even the source of his income, I find that it would be a serious injustice to reject the claim for dependency when it is evident that the Plaintiff and her children were dependent upon him.

35. In that respect, I find guidance from the following words of the Court of Appeal in the case of JACOB AYIGA MARUJA & ANOTHER Vs SIMEANE OBAYO, CIVIL APPEAL NO. 107 OF 2002;

"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates, and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good.

But we reject any contention that only documentary evidence proves these things."

36. In the circumstances, I hold that the trial court cannot be faulted for awarding compensation based on the dependency of the family of the

deceased.

37. I further hold that the use of the Basic Minimum Wage, in the circumstances where the income was not proved, was the correct step to take.

38. As the deceased was 55 years old, convention dictates that it be presumed that he would have continued to provide for his family for a further 5 years, when he would have reached his 60th birthday.

39. However, it is now well settled that when the court is determining an appropriate multiplier, it is imperative that the court takes into account the fact that the life expectancy of the deceased was subject to the vagaries of nature. Secondly, it must also be borne in mind that such sum as is awarded to the Plaintiff and the dependants of the deceased would be received sooner, as a lump sum, in contrast to what would have happened if he continued living and earning over a longer period.

40. Therefore, a reduction must be made when deciding on an appropriate multiplier.

41. In this case the trial court did not discount the period the deceased would have been expected to continue earning. Accordingly, I find that the application of a multiplier of 5 years was an error.

42. Therefore, the said multiplier is set aside, and I substitute it with one of 3 years.

Earnings

The Plaintiff had stated in the Plaintiff, that the deceased used to earn

Kshs 500/=. That would have translated to Kshs 15,000/= per month.

43. However, as I have already held, it would be unrealistic to expect the deceased to work every single day of the month.

44. Effectively, therefore, it is reasonable to estimate that the Plaintiff would have earned Kshs 11,000/= per month. I have arrived at that figure by discounting the month by the eight days which make up the weekends of any given month.

45. The Appellants had submitted that a sum of Kshs 5,000/= would have been reasonable, but I find the same to be too low.

46. On the other hand, I find that it would be wrong to utilize the Basic Minimum Wage in this case, because the Plaintiff had already intimated that the deceased was earning less than the said Minimum Wage.

47. In the result, the appeal is allowed in respect to the Loss of Dependency, and the same is recalculated thus;

Kshs 11,000 x 3 x 12 x 2/3 = Kshs 264,000/=.

48. That sum is then discounted by the 20% contributory negligence, leaving a balance of Kshs 211,200/=.

49. In respect to the General Damages for Pain and Suffering; and the Loss of Expectation of Life, I found no reason to interfere with the sums awarded by the trial court.

50. I also uphold the sums awarded as Special Damages.

51. In the result, the Respondent is now awarded the following amounts as compensation following the death of Thomas Otieno Odino.

(i) General Damages

(a) Pain & Suffering Kshs 20,000.00

(b) Loss of Expectation

of Life Kshs 120,000.00

(c) Loss of Dependency Kshs 211,200.00

Sub-Total Kshs 351,200.00

(ii) Special Damages

(i) Coffin Kshs 6,500.00

(ii) Police Abstract Kshs50.00

Sub-Total Kshs **6,550.00**

T O T A L Kshs **357,750.00**

52. In respect to the costs of the appeal, I order that each party should bear their respective costs. I so order because the appeal has only succeeded partially. In effect, part of the judgment which was being challenged, has been upheld.

53. It is thus only fair that each party should bear his/her own costs.

DATED, SIGNED and DELIVERED at KISUMU

This 23rd day of July 2019

FRED A. OCHIENG

JUDGE