



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HCCA NO.64 OF 2017

ROBERT NYAKUNDI MANDIEKA

(Suing as father and legal representative

of the Estate of WINNIE NYANCHAMA NYAKUNDI).....APPELLANT

-VERSUS-

BERNARD MASITA NYAKUNDI.....1ST RESPONDENT

POLPAK MOTORS LTD..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. J.M. Njoroge(C.M.) dated and delivered on the 19th day of July 2017 in the Chief Magistrate's Court Civil Suit No. 447 of 2016 at Kisii)

JUDGMENT

1. The appellant herein has filed this appeal on the trial court's assessment of damages. His case before the trial court was that on 4th April 2015 his daughter Winnie Nyanchama Mandieka ("the deceased"), was a lawful pedestrian along Kisii- Kilgoris road at Mwembe area when she was knocked down and fatally wounded by motor vehicle registration number KAQ 526 Q belonging to the defendants.

2. The appellant testified that the deceased was in good health when she died at the age of 28 years. She was not married, had no children and was about to graduate with a Bachelor's degree in Commerce (Accounting option) from Kisii University at the time of her demise. The appellant told the trial court that the deceased assisted him, her mother and 4 siblings and they had suffered loss as a result of her death. He also stated that he had spent Kshs. 63,100/= on funeral expenses and asked the court to award him damages, costs and interest.

3. Upon considering the appellant's evidence, the trial court awarded the appellant damages of **Kshs. 1,430,635/=** made up as follows;

a. Pain and suffering - Kshs. 20,000/=

b. Loss of expectancy of life - Kshs. 100,000/=

c. Loss of dependency - Kshs. 1,600,000/=

d. Special damages - Kshs. 63,000/=

Less double entitlement - Kshs. 100,000/=

Total Kshs. 1,683,100 less 15%

Net total Kshs. 1,430,635/=

Plus cost and interest

4. In his memorandum of appeal dated 18th August 2017, the appellant raised several issues which were highlighted by his counsel at the hearing of this matter. First, he complained that there had been no evidence contradicting his assertion that the deceased would have earned a monthly income of Kshs. 31,000/= and therefore the trial court erred in finding that the applicable income was Kshs. 20,000/=.Second, counsel submitted that the multiplicand of 12 years adopted by the trial court was grossly and inordinately low since the deceased died aged

28 years. Counsel argued that the deceased would have earned income for 32 years subject to the usual vagaries of life taking into consideration the conventional retirement age of 60 years. He pointed out that the trial court had guidance in the case of **Pauline Kulola Mwandimo v Duncan Mwandago Mwikamba NBI HCCC No. 2774 of 1992** where Mwera J. used a multiplier of 20 years where the deceased had died aged 35 years. Since the deceased in this case was in perfect health, it was argued that the trial court fell into error in adopting multiplier of 12 years without explanation, contrary to precedent. Lastly, it was submitted that the trial court erred in applying a dependency ratio of 1/3 as opposed to 2/3.

5. As the parties entered consent on liability in favour of the appellant in the ratio of 85:15, the only issue arising herein relates to quantum specifically the assessment of loss of dependency under the Fatal Accidents Act. In determining this issue I am mindful of the principle that an appellate court is not justified in substituting a figure of its own for that awarded in the trial court simply because it would have awarded a different figure if it had tried the case at the first instance. It must be shown that the learned magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. (See **Ali vs. Nyambu T/A Sisera Stores [1990]KLR 534 and Butt vs. Khan[1982-88] KAR 5**)

6. Having analyzed the evidence afresh as is required of a first appellate court and the oral submissions by Mr. Oguttu for the appellant, I will proceed to determine whether the trial court erred in assessing the loss of dependency when it held as follows:

Loss of dependency: *The plaintiff died at the age of 28 years. She was a university graduate, with Bachelors of Commerce degree she was not employed and hence her income is not discernible. The plaintiff has proposed a sum of Kshs. 31,000/= as monthly income to be reasonable. However, there are other factors that come into play, including the lack of employment, including for graduates in our country. I shall grant an estimated amount of Kshs. 20,000/= per month to be reasonable. The court further finds that at the time she met her death the deceased was not married and didn't have a family. I shall adopt a multiplicand 1/3. The parties are in general agreement, that a multiplier of 20 is reasonable under the circumstances.*

The said sum works out as follows:

$$20,000/= \times 1/3 \times 12 \times 20 = 1,600,000/=$$

7. The trial court has been faulted for adopting a monthly income of 20,000/=, the appellant having suggested a monthly income of 31,000/=. From the proceedings, it is evident that no proof was adduced supporting this proposed income. Similarly, the respondents filed submissions before the trial court proposing a global sum of Kshs. 500,000/= but did not back their proposal with any evidence or authorities.

8. However in the case of **Jacob Ayiga Maruja & another v Simeon Obayo Civil Appeal 167 of 2002 [2005] eKLR** the Court of Appeal rejected the argument that the only way to prove income was through documentary evidence.

9. In the present case, there was evidence that the deceased was pursuing a Bachelor's degree in Commerce (Accounting option) and was about to graduate at the time of her demise, which prompted the trial court to adopt the multiplier approach. The trial court proceeded to use a multiplicand of Kshs. 20,000/= having factored in unemployment.

10. In the case of **YH Wholesalers Ltd & Another v Joseph Kimani Kamau & Another Civil Appeal No. 454 Of 2015 [2017] eKLR** the court upheld a sum of Kshs. 20,000/= where the appellant had proposed Kshs. 27,000/= as the average salary of a nurse. In the case of **Samwel Kimutai Koriri (suing as personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School) & another Civil Case No. 229 of 2010 [2016] eKLR** the court adopted a sum of Kshs. 18,000/= as the multiplicand, where the plaintiff had suggested an income of Kshs. 20,000/= for the deceased who was training as a P1 teacher. As the appellant's income would also have been subject to income tax of about 10%, I find that the trial court cannot be faulted for reducing the appellant's proposal of a monthly income of Kshs. 31,000/= to Kshs. 20,000/=.

11. Turning to the appellant's contention that the dependency ratio of 2/3 was inadequate, it was the evidence of the appellant that the deceased was unmarried and had no children. The dependants contemplated under **section 4 (1)** of the **Fatal Accidents Act** are the deceased's spouse, parents and children if any. The deceased's brothers and sisters would not be dependants for purposes of the Act.

12. The respondent cited the case of **Samwel Kimutai Koriri (suing as personal and legal representatives of estate of Chelangat Silevia v Nyanchwa Adventist Secondary school & Anor. Civil Case No. 229 of 2010 [2016] eKLR** before the trial court, where the court adopted a dependency ratio of 1/3 for a deceased who had died unmarried and without children. I therefore find no reason to interfere with the dependency ratio of 1/3 or the multiplier of 20 years which was agreeable to both parties.

13. In the end, I find that this appeal lacks merit and is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kisii this 20th day of September 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Godia h/b Mr. Ochwangi For the Appellant

Respondent Absent

Mr. Omwoyo Court clerk