



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 732 OF 2016

JULIUS NZIVA NUNGU and

EMILY KAVUTHA NZIVA (Suing as administrator

ad litem of the estate of the late

SIMON KIVUITU NZIVA (Deceased).....APPELLANTS

VERSUS

JOSEPH NGARUIYA WAMBUI

DAVID KARANJA.....RESPONDENTS

(Being an Appeal from the Judgment delivered by the Hon. L. Gichohi, Senior Resident Magistrate at Nairobi on the 25th November, 2016) in civil Suit No. 2887 of 2014)

JUDGMENT

This appeal arose from the judgment of the lower court delivered on 25th November, 2016. The appellants were the administrators of the late Simon Kivitu Nziva who died as a result of a road traffic accident on 10th June, 2013. The deceased was a fare paying passenger in motor vehicle registration No. KBF 953 H which was involved in an accident along Ring Road Nairobi. The appellants blamed the accident on the respondents which they denied.

That notwithstanding the parties entered into a consent judgment on liability whereupon the respondent was to bear 90% and the deceased 10%. The case then proceeded for hearing on the subject of quantum only. After the hearing the court made a total award of Kshs. 1,440,966.60. This included Kshs. 1,173,714/= under lost years, Kshs. 150,000/= loss of expectation of life, Kshs. 200,000/= pain and suffering, Kshs. 77,360/= special damages making a total of Kshs. 1,601,074/=. This figure was subjected to 10% contribution on the part of the deceased which was Kshs. 160,107.40/= leaving a balance of Kshs. 1,440,966.60. The appellants were also awarded costs of the suit.

The appellants were aggrieved by the said judgment and lodged this appeal. In the Memorandum of Appeal dated 29th November, and filed on 5th December, 2016 the appellants complained that the lower court applied wrong legal principles and arrived a wholly erroneous award, took into account irrelevant considerations and failed to take into account relevant factors and made an award which was too low as to represent a wrong estimate of the loss and damage.

The lower court was also faulted for failing to take into account the evidence adduced by the appellants on earnings, employment and secondment to the bank or misunderstanding it. It was also the appellants' case that the trial court confused loss of dependency with lost years. The failure to award some special damages for want of stamp duty was also faulted and so was the failure to follow the authorities cited. The failure to award interest on special damages from the date of filing the suit was also faulted.

As the first appellate court, I have evaluated the evidence adduced before the lower court with a view to arriving at an independent conclusion. There was evidence adduced before the trial court that the deceased was employed by a company known as Clovers Management and Training Consultants Limited as a clerk but seconded to Barclays bank. His gross salary was Kshs. 33,000/= which after statutory deductions left a balance of Kshs. 28,354/= net salary per month.

The appellants produced the pay slips of the deceased for the months of January and February, 2013. That notwithstanding, the lower court adopted the minimum wage as the correct multiplicand in assessing the loss of dependency. In doing so, the court observed that the employment of the deceased with his employer as opposed to Barclays bank of Kenya was not clear.

With respect, the trial court was misdirected. P.W. 1, the father of the deceased gave evidence relating to the employment of the deceased

who was employed by Clovers Management and Training Consultants Limited but seconded to Barclays Bank. He was cross examined on this subject and remained firm in that regard. It is clear that the deceased could not have been in possession of a pay slip from Barclays Bank of Kenya because he was seconded there by his employer.

It is instructive that the respondents did not produce any evidence to dispute that evidence. The right multiplicand was therefore Kshs.28,354/= being the net salary of the deceased from his employer.

The deceased was 24 years old and single. He must have been using a substantial sum on himself, that is to say 2/3 and reserved 1/3 for his parents. A multiplier of 30 years was applied by the court. That was within the perimeters of the age of the deceased at the time of his death because he could have died of many causes including the accident that claimed his life. Loss of dependency works out to Kshs. 28,354 x 12 x 30 x 1/3 = Ksh. 3,402,480/=.

I am unable to fault the other awards made by the court for the following reasons. The sum of Kshs. 150,000/= for loss of expectation of life was also within limits. On pain and suffering, I note that the accident took place on 10th June, 2013 and the deceased taken to Kenyatta National Hospital. According to P.W. 1 when he visited him, he was on life support machine. He could not communicate and passed away on 15th June, 2013. This was after five days.

The death certificate on record showed that he died as a result of head injury due to blunt force trauma. In that regard therefore the award of Kshs. 200,000/= for pain and suffering cannot be faulted.

The lower court denied the appellants some money pleaded as special damages because the stamp duty thereon had not been paid. Special damages must be specifically pleaded and strictly proved. The appellants produced evidence to justify the claim for Kshs. 117,360/= alongside other costs which may not require receipts.

The respondents did not plead failure to pay stamp duty. Submissions may not take the place of evidence at any given time and therefore once again, the lower court misdirected itself in denying the appellants that sum.

After considering all the evidence on record therefore, this appeal must succeed. Accordingly, the lower court judgment is hereby set aside and in place thereof there shall be judgment for the plaintiff as follows, Kshs. 3,402,480/=, loss of dependency 150,000/=, loss of expectation of life Kshs. 117,360/= making a total of Kshs. 3,752,597.36 which shall be reduced by Kshs. 375,259/= being 10% contributory negligence, leaving a balance of Kshs. 3,377,337.60. The appellants shall also have the costs of the suit in the lower court and in this appeal plus interest at court rates.

For avoidance of any doubt, special damages attract interest from the date of filing the suit while general damages attract interest from the date of judgment.

Dated, signed and delivered at Nairobi this 17th day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE