



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 47 OF 2017

JOSEPH MWANGI WANYEKI.....APPELLANT

VERSUS

ALEX MURIITHI MUCOKI.....1ST RESPONDENT

JULIUS MACHARIA KUGWA.....2ND RESPONDENT

(Both suing on behalf of the Estate of MICHAEL MUCOKI NJIRU (Deceased))

(Being an Appeal from the Judgement and Decree of the Honourable Njeri Thuku, Principal Magistrate delivered in Lamu PMCC No. 25 of 2015 on 28th August, 2017)

Coram: Hon. Justice R. Nyakundi

Mr. Wairagu for the appellant

Mr. Kazungu for the respondent

JUDGEMENT

Background

The administrators to the estate of the deceased Michael Mucoki Njiru by way of a plaint filed in court on 11th June, 2015 initiated a claim against the appellant to recover damages under the Fatal Accident Act for the benefit of both dependants as well as expenses under the Law Reform Act.

The claim was based on tort of negligence arising out of a road traffic accident which occurred on 27th November, 2013 involving motor vehicle registration **KAM 167G** owned by the defendant and a motorcycle registration **KMCC 712H** operated by the deceased.

As a result of the collision the deceased sustained fatal injuries in which the defendant was held to be liable as alleged and particularized in paragraph 5 of the plaint.

The defendant filed statement of defence denying any acts of negligence on his part in respect of the injuries and death of the deceased. The suit was heard by way of viva voice evidence and corroborated by documentary evidence.

In the pretrial direction consent on liability was entered at 100% in favour of the respondent as against the appellant in terms of the order adopted in **Lamu PMCC. No. 4 of 2016**.

The issue before the trial court therefore remained that of assessment of quantum of damages under Fatal and Accident Act and Law Reform Act, for the benefit to the estate of Michael Mucoki.

In her considered judgement delivered on 25th August, 2017 the learned trial magistrate awarded damages as follows: -

- a) Loss of expectation of life and dependency Kshs.3,600,000

b) Pain and suffering	Kshs.20,000
c) Funeral expenses	Kshs.30,000
d) Material damage of the motor cycle	Kshs.55,000
e) Grant ad litem	Kshs.15,000
f) To this costs of the suit and interest.	

Being aggrieved with the judgement on quantum the appellant preferred this appeal as premised on the grounds in the memorandum of appeal stated as follows: -

a) That the learned principal magistrate misdirected herself in law by assessing damages that were manifestly excessive and incomparable to the common judicial awards.

b) That the learned trial magistrate erred in law in failing to appreciate the applicable principles in assessment of damages used at the Fatal Accidents and Law Reform Act.

Submissions on appeal by the appellant

According to the Firm of Murimi Ndumia on behalf of the appellant the learned trial magistrate erred in applying an income of Kshs.30,000 per month as set income without proof of cogent evidence. That despite indication in the death certificate that the deceased was a farmer and motorcycle operator, the actual income from those activities were not proved. Learned counsel contended that the best that could have been used was a minimum wage guideline orders gazetted by the Ministry of Labour to that effect. He relied on the case of **Beatrice Murage v Consumer Transport Ltd 2014 eKLR** for the legal proposition to support earnings on the minimum wage. See also **Gachoki Gaturu v John Ndega Njagi & 2 others 2015**, and Motor Vehicle Third Party Risks Amendment Act – on the definition of the term income earnings defined to **mean revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of such documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act 2007 or the determination of the reasonable income whichever is higher.**

Learned counsel also submitted against the multiplier of 15 years given the age of the deceased at the time of his death. On this legal proposition counsel placed reliance on the case of **Mutuku Mbithi v Coast Bus Safaris Ltd & another 2012 eKLR**. **Muasya Mburi Kiseli v Martin Mutisya 2010 eKLR**. In the matter of this case learned counsel argued and submitted that a multiplier of 4-5 years would have been found to be appropriate. According to learned counsel the multiplier of 15 years used by the Leaned trial magistrate was on the higher side of the scale for a victim aged 57 years. The appellant counsel therefore urged this court to interfere with the award for being erroneous and wrong in principle.

Submissions on behalf of the respondent

Mr. Njoroge on behalf of the respondent submitted that there was no error in law or fact in the approach taken by the learned trial magistrate in assessing quantum in favour of the estate of the deceased. The respondents' counsel explained that pursuant to the guiding principles on **KEMFRO Africa Ltd T/A Meru Express Services Ltd v Aziri Kamu Mudika Lubia & another 1985 eKLR**, the courts discretion though wide is to be exercised judiciously and is enjoined to apply the already settled principles in this case. See also **(Catholic Diocese of Kisumu v Tete 2004 eKLR)** Learned counsel further submitted that the evidence by the respondent before the trial court was supported by a witness identified as **Alex Mureithi**. Learned counsel contended that there no rebuttals by the appellant.

As regards the position of the law on this issue learned counsel relied on the authorities of **Mary Njeri-Murigi v Peter Macharia & another 2016 eKLR**, **Jacob Ayiga Maruja & another v Simeon Obayo 2005 eKLR**, **Payless Car Hire & Tours Ltd & another v Lucy Njeri-Njenga Bungoma HCCA No. 83 of 2012 (2017 eKLR)**.

Learned counsel for the respondent further urged this court to find that assessment of damages is within the discretionary power of the court to be exercised depending on the unique circumstances of each case. On this legal preposition learned counsel placed reliance on the cases of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko**.

Regarding quantum under the Fatal Accidents Act learned counsel submitted that the award to the respondent was justified and supported by the case of **Jacob Ayiga Maruja & others v Simeon Obayo CA 167 of 2002**. He argued and urged this court not to interfere with the judgement of the trial court. According to counsel the appellant did not lead evidence at the trial to controvert the case for the respondent and the income earnings by the deceased.

I have carefully and anxiously considered the evidence adduced in support of the claim and further submissions made on appeal in regard to quantum as to damages payable to the respondent.

The law, analysis and determination

With regard to the specific exercise of discretion as the 1st appellate court, I rely on the ready settled guiding principles in the case of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123**.

In relation to this approach on assessment of damages I take into account the provisions of the Law Reform Act and Fatal Accident Act.

Law

“Section 2(c) of the Law Reform Act provides where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequence on his death, except that a sum in respect of funeral expenses may be included.”

The law on this point is settled such that awards are made for loss of expectation of life, funeral expenses, and other special damages and for lost years for the benefit of the deceased estate.

On the quantum of loss of dependency under the Fatal Accidents Act Section 4 provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct.”

Section 5: “Notwithstanding the provisions of Section 4, it shall be sufficient, when the defendant pays money into court, that he pays it as a compensation in one sum to all persons entitled under that section to damages for his wrongful act, negligent or default, without specifying the shares into which it is to be divided by the court, and if that sum is not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the court think it sufficient, the defendant shall be entitled to judgment on that issue.”

The general scope on assessment of damages was considered in the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988 Ringera J** as he then was stated:

“The principles applicable to an assessment of damages under the Fatal Accidents Acts are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

The instant appeal facts and evidence falls within the Law Reform Act and Fatal Accident Act. By virtue of the tortfeasor's acts of negligence the deceased estate suffered loss of dependency arising out of the fatal injuries sustained at the time of the accident. From the evidence the trial magistrate took into account the deceased age at 57 years. She accepted and apportioned the dependency factor going by the testimony of the claimant and documentary material admitted at the trial of the claim. As the children and wife were dependant on deceased they were entitled to be compensated for the loss arising from the premature death due to the negligent acts of the defendant/appellant.

The bone of contention in this appeal being the multiplier of 15 years used by the learned trial magistrate against an income of Kshs.30,000/= per month. The issue which therefore arises in this appeal is whether in assessing damages the learned trial magistrate erred in law and fact in applying the wrong parameters of 15 years and an income of Kshs.30,000/=-, respectively.

Reliance was placed by learned counsel in the cases of **Mutuku Mbithi and Muasya Kisili (supra)** for this court to exercise its applicable jurisdiction to interfere with the award by substituting it with a multiplier of 4-5 years for calculating loss of dependency and expectation of life. As for the income earnings Learned Counsel for the Appellant proposed a figure of Kshs 8,757.

Having reviewed the cases cited by both counsels and bearing in mind the principles applicable to cases of this matter of assessment of damages under the various limbs, I take the following view: I draw the attention of both the appellant and respondent to the following evidential material on record: - Notably, from the death certificate the deceased died at the age 57 years and it is stated that during his life time, his occupation was in farming activities and Boda-boda business operations. It is also clear from the letter of the locational chief of Mpeketoni dated 7th January 2014 that the deceased was survived by the following dependents:

Tulia Muthoni (Wife)

AM (son) SK (son)

JW (Daughter) AN (son-minor)

GW (Daughter) JM (son-minor)

RR Daughter) JM (son-minor)

In determining the loss of dependency and calculation of damages for death arising from a fatal accident **Lord Diplock** in **Cookson v Knowles (1978) 2 ALL ER 604**, discussed the degree of speculation that a court must embark as herein:

“This kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow’s death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and dependent children?”

In my view, the meaning given to the words income or revenue received during the lifetime of a deceased person should not be subjected to a restrictive interpretation, so as to arrive at an erroneous high or low award of damages. **Harold Luntz** in his book on the assessment of damages on personal injury and death observed that

“there need not been a contractual right to receive payment as long as there was reasonable chance that the claimant would have earned the money, thus a waiter may claim tips, he would have received.”

The above principles form the basis of our jurisprudence as illustrated by the **Court of Appeal Case of Jacob Ayiga v Simon Obayo (2005) Eklr** where the court stated as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to 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 can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed”

Putting the facts of this appeal in context there is no question that the Plaintiff occupation was positively confirmed to be that of farming and boda-boda business. Though economic times are hard, reasonably one can take judicial notice that in the rural and urban cities the mode of transport which has gained prominence due to its easier navigation of the terrain of our road networks is the commonly referred vessel as boda-boda. The mere fact that the deceased earnings from farming activities and boda-boda business was not supported by actual receipts and other accountable documents does not mean it is a speculative component as an estimate of the loss suffered by virtue of his death. I do not subscribe to the narrative that an approach on assessment on damages on loss of dependents is a question of mathematical precision.

The Respondent’s evidence taken as a whole satisfied the standard of proof on a balance of probabilities that the deceased earned Kshs. 30,000/= from his boda-boda business and farming activities. The Appellant never controverted this direct evidence from the claimant. I am therefore inclined to use the figure of Kshs.30,000/= as a guide to support the gross monthly income from both farming and boda-boda business enterprise.

I take judicial notice that is not every man or woman in an income generating venture has the ability to keep proper book of accounts, track daily sales, profit and loss account or even own a bank account. In so much as it may sound popular and an ideal approach as a model of business accountability the level of financial illiteracy among our citizenry are factors that should not be used against any claimant in calculating the average net income to assess damages under the Fatal Accident Act.

On evidence before me, on the issue of multiplier I rely on the following authorities: In the case of **Irene Kagandi & Mary Wanda Kaganda v W. Tiltrey Muthaiga Ltd – 1st defendant and Walter Juma – 2nd defendant**, the learned Judge apportioned the aspect of loss of expectation of life and dependency for 49 years old deceased person by adopting a multiplier of 11 years to calculate damages under this head.

In **Joseph Katuga Gathii v world Vision Kenya & others 2010 eKLR**. The circumstances of this particular case the deceased was involved in a road traffic accident and at the time of his death he was aged 57 years, the court permitted a multiplier of 8 years to determine his loss of earnings.

In **Florence Gatheo Miano v Mary Boniface & Jackson Wambua & another 2017 eKLR**, the brief facts of this case are that the deceased died at the age of 57. At the time learned magistrate admitted a multiplier of 10 years to prove actual loss of dependency. On appeal, the High Court affirmed multiplier of 10 as applicable to the facts of the case before the trial court.

In this case the respondent proved the fact of death and dependency. The presumption in law is that deceased is taken to spend 1/3 of his income to himself while 2/3 is available as reserve for the dependants. The main provisions in the Fatal Accidents Act is to provide guidelines for compensation in the event of a wrongful death for the pecuniary losses of persons who were dependent on the deceased.

The respondent in his evidence testified that the deceased was a farmer and an operator of a motorcycle with a daily estimated income of Kshs.1,300. Consequently, he stated after subtraction of expenses he retained Kshs.1,000 as available net income. More specifically the respondent told the trial court that the deceased was surrounded with ten children and their last born aged 6 years old at the time of his death. Such a multiplicand of kshs.1,000 was used by the learned trial magistrate to assess the monthly value of lost dependency at the date of the

deceased' death.

Generally, under the Fatal Accidents Act on loss of dependency a husband with a family consisting of wife and children unless the contrary is shown by way of cogent evidence is taken to shoulder full responsibility for the family upkeep and maintenance.

In arriving at the figure of Kshs.3,600,000 for loss of expectation of life and dependency the learned trial magistrate heavily relied on the multiplier of 15 years and multiplicand of income per month of Kshs.30,000. It is a fact that the deceased worked in the informal sector involving farming activities and operating boda boda transport business. It is more probable that the deceased would have remained in employment past 70 years. They are no extenuating circumstances that the deceased could have retired at the age of 60, 61 or 55 such vicissitudes of life are in the realm of unknown.

What now remains is whether or not the learned trial Magistrate was wrong in awarding the respondent general damages for loss of dependency in applying an average income of Kshs.30,000/= with a multiplier of 15 years. In my view on income earnings I am guided by the dictum of **Jacob Ayiga Maruja & another v Simeon Obayo 2005 eKLR**. Applying the principles in **Jacob Ayiga Maruja** case to the present appeal I am not persuaded that the Learned Magistrate was wrong in any way to calculate loss of earnings by the deceased on account of income of Kshs.30,000/=. The only item which on examining in some details a number of previous cases, am unable to agree with the Learned Magistrate that a multiplier of 15 years to determine the number of years of loss of dependency was a little bit on the higher side. On this basis I adopt a multiplier of 10 years in favour of the respondent. This is broadly considering the context and essential test of the principles in the case of **Shah v Mbogo Kemfro Africa Ltd v Lubia** (supra).

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Having examined the evidence afresh by the trial court it is now clear to me the arrival on loss of dependency was inordinately high making it wholly erroneous in the sum total of the award. That part of the judgement failed to take into account the correct multiplier to assess damages.

The Learned Magistrate therefore exercised her discretion within the limits and principles instructive on assessment of damages. The only point of departure as persuaded by the above authorities is on the multiplier of 15 years. I note that life expectancy in Kenya is between 64 and 69 years as per 2018 World Health Organization data index. It is also well known that the life expectancy is dependent upon enjoyment of good health during the life time of a human being. We are not told that the deceased suffered from any ailment prior to his death. He could therefore as well have lived beyond the age of 70 years and still be involved with his farming and Boda-boda activities. Using the cases cited above as a guide and the life expectancy and further taking into account the uncertainties of life, I believe a multiplier of 10 years will not be speculative.

Taking the deceased at the time of his death was aged 57 years, making reference to vicissitudes of life which will affect the victim's life expectancy some adjustment be made to the multiplier of 15 years with that of 10 years to apply in this case.

In the end the appeal on this head succeeds in the following modeled structure of **Kshs. 30,000 x 12 x 10 x 2/3 = 2,400,000**.

For the above reasons I allow this appeal partially on item (1) set aside the initial decree of the trial court in lieu of the appeal judgement for the respondent in the following terms: -

1. Loss of dependency under the Fatal Accidents Act Kshs. 2,400,000

2. Pain and suffering Kshs.20,000

3. Funeral expenses Kshs.30,000

4. Damaged motorcycle Kshs.55,000

Costs of this appeal be bone equally by both the appellant and the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OCTOBER, 2019.

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R. NYAKUNDI

JUDGE

In the Presence of:

1. Waithera for the appellant: Present