



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 14 OF 2018

AGNES WAKIO MWAKAYA.....APPELLANT

VERSUS

PHILIP NYAMBOGI NYAUMA & NYAMBOKI ORIOKI

HILLARY (Suing as the Administrators on behalf of

BEATRICE MORAA NYAMBOKI).....RESPONDENTS

{Being an appeal against the Judgement of Hon. B. M. Kimtai - SRM Keroka

dated and delivered on the 25th day of September 2018 in the original

Keroka Principal Magistrate's Court Civil Case No. 81 of 2017}

JUDGMENT

This appeal arises from a claim for damages under the Law Reform Act and the Fatal Accidents Act following a motor vehicle accident in which the respondent's wife sustained fatal injuries. Liability was agreed between the parties in the ratio 70%:30% in favour of the respondent against the appellant and this appeal is only on the quantum of damages. The gravamen of the appeal is that the damages awarded are inordinately high.

The appeal was canvassed by way of written submissions. The principles which an appellate court ought to consider when dealing with an appeal such as this were enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)' & Another v Lubia & Another (No 2) [1987] KLR 30** where it was held:

"1. The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Before filing the suit, the respondent obtained a limited grant for letters of Administration ad litem which gave him locus to claim damages under the Law Reform Act for the benefit of the deceased's estate and being the deceased's spouse gave him authority to bring a claim under the Fatal Accidents Act. The trial Magistrate did not therefore err when he awarded damages under both acts.

On the quantum of damages, it is trite law that special damages must be specifically pleaded and strictly proved. The respondent was awarded Kshs 20,000/= for a coffin and Kshs 20,000/= for the limited grant making a total of Kshs 40,000/=. In addition to those two items he had also pleaded a sum of Kshs 50,000/= for funeral expenses. However, he only produced receipts for the coffin and legal fees and that is what was awarded. The receipts were produced at the trial and are what the trial Magistrate referred to in awarding damages under that head.

Counsel for the appellant faulted the trial magistrate's assessment of damages under the Fatal Accidents Act and submitted that the court should have made a global award. With due respect that is not a correct proposition of the law. The deceased was an adult with an occupation and an income unlike a child whose prospects in life are not predictable in which case the courts advert to global awards. The principles for assessment of damages in claims such as this one are those alluded to by Ringera J, as he then was, in the case of **Beatrice Wangui Thairu v Hon Ezekiel Barngetuny & Another NBI HCCC No 1638 of 1988** cited by Counsel for the appellant. Those principles are:

“The Principles applicable to the assessment of damages under the Fatal Accident Act are 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 of life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants.”

The deceased in this case was a married woman with children. The dependency ratio of 2/3 applied by the trial court was therefore not in error. As a trader she would have worked even up to sixty years. However, it is important to consider the vagaries of life and the court must therefore use what Ringera J described as **“a reasonable figure representing so many years purchase”**. The trial court used a figure of 16 years which in my view is reasonable. I am however persuaded that the court erred in arriving at the multiplicand. The documents produced to prove the deceased’s income have nothing to show they concerned her and they also do not reflect her net income. It is my finding therefore that the multiplicand in this case ought to have been the general wage applicable at the time which the trial Magistrate found was Kshs 10,000/=. Accordingly, I assess damages under this head as follows:

Kshs. 10,000 x 12 x 16 x $\frac{2}{3}$ = Kshs. 1,280,000/=

The trial Magistrate’s award under the head of pain and suffering was premised on precedent and so I shall not disturb it. Loss of consortium was pleaded in the plaint and I shall not disturb the award.

On the submission that the award for loss of expectation of life is excessive my finding is that the sum of Kshs 100,000/= awarded is a conventional sum. However, where the court has not taken that award into consideration when computing the award for loss of dependency then it ought to be deducted. That was the ratio in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (supra)**. In this case neither the trial court nor this court has taken the award for loss of expectation of life into account and so in computing the final award this court will deduct it. The appeal succeeds to the extent set out above and the judgment in favour of the respondent shall be adjusted as follows:

A. General damages

i. Pain and suffering Kshs. 70,000/=

ii. Loss of expectation of life Kshs. 100,000/=

iii. Loss of dependency Kshs. 128,0000/=

B. Loss of consortium Kshs. 100,000/=

C. Special damages Kshs. 40,000/=

Sub-total Kshs. 1,590,000/=

Less the award for loss of expectation

of life Kshs. 100,000/=

Total = Kshs. 1,490,000/=

The aggregate of the award shall be subject to the agreed ratio of distribution 70%:30% and the net of the award for loss of dependency shall be distributed equally between the respondent and the children of the deceased named in the plaint.

The respondent shall get the costs of the suit in the lower court and as the appellant has succeeded partially in the appeal she shall get half the costs of the appeal. It is so ordered.

Signed, dated and delivered in Nyamira this 7th day of November 2019.

E. N. MAINA

JUDGE