



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO.12 OF 2018**

**MARTHA MUTHONI NDEGE**

**(Appealing as the legal representative of**

**The Estate of STANLEY NDEGE GICHUKI - (DECEASED).....APPELLANT**

**VERSUS**

**ANTHONY KAMAU KAMBIRIRI.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of part of the Judgment of Hon. F.W. Macharia SPM delivered on 15<sup>th</sup> February, 2018 in Karatina PMCC No.34 of 2014; the cause of action arose out of a Road Traffic Accident that occurred on 1<sup>st</sup> September, 2013; the trial Court after a full hearing, gave the following judgment:-

- Liability – 100% against the respondent
- Pain and suffering – Kshs.15,000/=
- Loss of expectation of life – Kshs.100,000/=
- Loss of dependency – Kshs.400,000/=
- Loss of consortium - Nil
- Special damages – Kshs.157,050/=

2. The appellant being aggrieved by the award on loss of dependency and the dismissal of the prayer for loss of consortium filed a Memorandum of Appeal and listed the following Grounds of Appeal:-

- (i) The trial Magistrate erred in law and fact in the assessment of the damages for Loss of Dependency thereby arriving at an excessively low award;
- (ii) The trial Magistrate erred in law in dismissing the claim for loss of consortium and servitude.

3. The parties agreed to dispose of the Appeal by filing and exchanging written submissions; hereunder are their rival submissions;

**APPELLANT'S SUBMISSIONS:**

4. On the issue of loss of dependency, the appellant's submitted that the deceased was a Site Manager earning a salary of Kshs.60,000/= per month; it was the appellant's prayer that this sum be applied as the multiplicand; in support thereof, the appellant relied on a letter from Hon. Matere Kereri indicating that the deceased was employed as Site Manager and being paid Kshs.2,000/= per day; this letter was produced as an exhibit at the trial in the lower court;

5. As for the dependency ratio, the appellant submitted that the trial court ought to have applied a ratio of 2/3 and not 1/3 since the deceased was married and had children;

6. With regard to the dismissal of the prayer for an award of loss of consortium, the appellant submitted that this Court do award Kshs.800,000/= and relied on the case of **PBS & Another vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016]eKLR** in support thereof;

7. The appellant prayed that the award for loss of dependency be set aside; and the dismissal of the claim for loss of consortium be set aside; and that the appeal be allowed together with costs of the appeal and that of the lower court.

#### **RESPONDENT'S SUBMISSIONS;**

8. In response the respondent submitted that there was no evidence of the deceased's income and therefore the trial court ought to have applied the minimum wage applicable; and relied on the case of **Pleasant Views School Limited vs Rose Mutheu & Anor [2017]eKLR**;

9. The respondent's submissions were not clear on whether to apply the multiplicand of Kshs.10,000/= as was cited in the quoted authority or whether the trial Court's award be maintained; as for the dependency ratio, the respondent prayed that the trial Court's application of 1/3 be maintained.

10. On the loss of consortium, the respondent submitted that the same should not be awarded and relied on the case of **Innocent Ketiie Makaya Denge vs Peter Kipkore Cheserek & Anor [2015]eKLR**; the Court therein found that there was no basis to make such an award when assessing damages in a fatal accident matter; the court held that a claim for loss of consortium applied only in situations where the victim of the accident was still alive but unable to enjoy consortium with their spouse due to injuries sustained from the accident.

11. The respondent urged the court to dismiss the appeal with costs to the respondent.

#### **ISSUES FOR DETERMINATION**

12. After reading the parties rival written submissions this court has framed the following issues for determination;

(i) Whether to interfere with the trial court's award for the damages for Loss of Dependency thereby arriving at an excessively low award;

(ii) Whether the trial Magistrate erred in law in dismissing the appellants claim for loss of consortium and servitude.

#### **ANALYSIS**

13. This being a first appeal, this Court has a duty to review the evidence submitted at trial to establish if the resulting judgment was justified; this court is guided by the Court of Appeal's renowned case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; the Court of Appeal also held that:

***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."*** (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403)..."

14. This court is also cognisant of the fact that for this Court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions; in the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

***"An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low."***

15. Similarly in the case of **Kenya Breweries Ltd vs Saro [1991] eKLR** it was held that,

***"It is now well established that this Court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred"***

16. This court is guided by the above principles when addressing the issues framed for determination;

#### **Whether to interfere with the trial court's award for the damages for Loss of Dependency; whether the award was excessively low;**

17. To begin with it is now well settled that loss of dependency is a question of fact which needs to be proved by evidence; it was the appellant's evidence that the deceased was her husband and father to their 5 children; the said children are all adults; according to her witness statement adopted at trial, the deceased would support her by giving her Kshs.20,000/= to 30,000/= for upkeep; the appellant testified that the deceased earned Kshs.60,000/= per month from his work as a Site Manager; a letter in support thereof was produced;

18. The letter being relied on by the appellant indeed indicates that he was paid Kshs.2,000/= per day; but it is noted that it doesn't indicate how many days a week he worked, further it doesn't indicate the duration of the project he was employed for; there was no other evidence of any other projects the deceased was involved in or any other source of income; to support the claim of Kshs.60,000/= based on the evidence before the Court, it would mean the deceased worked 30 days a month; this is improbable; nevertheless it is not in dispute that the deceased was earning some income;

19. In the circumstances, this court finds no good reason as having been advanced by the appellant to warrant the interference with the multiplicand of Kshs.20,000/= as applied by the trial court;

20. With regard to the dependency ratio, there was evidence from the deceased's wife in support of her dependency on the deceased; there was however no evidence tendered by the adult children as to how they were dependent on the deceased; there was also no evidence on the age of these adult children; dependency cannot be simply assumed where the deceased had adult children; it is imperative that evidence is tendered in support thereof.

21. This court reiterates that dependency is a question of fact that must be proved; and therefore this court equally finds no reason to interfere with the dependency ratio of 1/3 as applied by the trial Court;

22. This ground of appeal is found to be lacking in merit and it is hereby disallowed.

**Whether the trial Magistrate erred in law in dismissing the appellants claim for loss of consortium :**

23. Damages under this head is categorized as general damages; this was pleaded for in the amended plaint; the appellant has relied on the case of **PBS & Another vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016]eKLR** where the Court awarded Kshs.800,000/= as damages under this head.

24. As indicated hereinabove, the respondent has submitted that this being a fatal accident matter, the appellant is not entitled to damages for loss of consortium and the respondent relied on the case of **Innocent Keti Makaya Denge vs Peter Kipkore Cheserek & Anor [2015]eKLR**.

25. It is clear that there is support for both opposing schools of thought and since both cases were decided by courts of concurrent jurisdiction the authorities are not binding on this Court and are merely persuasive; this therefore means that this Court is at liberty to decide which school of thought is more persuasive; however, in the Court of Appeal case of **Salvatore De Luca v Abdullahi Hemed Khalil & Another [1994] eKLR** it awarded Loss of Consortium in a fatal accident claim; the Justices of Appeal held thus:

***“So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full.” (emphasis mine).***

26. This Court is bound by the decisions of the superior Court under the doctrine of *stare decisis*; the upshot is that the appellant is entitled to an award hereunder as she lost the love and companionship of her husband.

27. As to what amount should be awarded, this Court has discretion to determine the same based on the circumstances; and makes an award of Kshs.100,000/= which it finds would be adequate recompense;

28. This ground of appeal is hereby found to have merit and is hereby allowed.

**FINDINGS AND DETERMINATION**

29. The appeal is found to be partially successful;

30. The appeal on loss of dependency is found lacking in merit and is hereby dismissed; and the trial Court's award is hereby upheld;

31. This court finds that the trial court erred in failing to award damages for loss of consortium; the appeal on loss of consortium is found to be meritorious and is hereby allowed; the judgment disallowing the prayer is hereby set aside; and an award in the sum of Kshs.100,000/- is hereby entered in favour of the appellant; together with costs and interest;

32. Each party shall bear their own costs on this appeal;

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of November, 2019.**

**HON.A.MSHILA**

**JUDGE**