



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 25 OF 2018

RICHARD MAISIBA GICHANA.....APPELLANT

-VRS-

1. FREDRICK OLUOCH OKUTA.....1ST RESPONDENT

2. EVERLINE AKINYI.....2ND RESPONDENT

{Being an Appeal against the Judgement of Hon. L. K. Gatheru – SRM Keroka dated and delivered on the 28th day of November 2018 in the original Keroka Principal Magistrate’s Court Civil Suit No. 202 of 2017}

JUDGMENT

1. The respondent herein sued the appellant seeking damages under the Law Reform Act and the Fatal Accidents Act following the death of his sister in a motor accident involving the appellant’s motor vehicle Registration No KCF 832E and motor vehicle Registration No KBK 308K. The accident is said to have occurred on 22nd December 2016. The claim under the law reform act was made for the benefit of the estate of the deceased with that under the fatal accidents being on behalf of her three children. Counsel for the parties recorded a consent judgment on liability in the ratio 70:30% in favour of the respondent against the appellant and this appeal is on the quantum of damages only.

2. In their submission Counsel for the appellant contended that the damages awarded to the respondent were inordinately excessive and reduced the grounds of appeal into three issues as follows:

I. The income adopted.

II. The multiplier/multiplicand adopted.

III. Failure by the trial court to offset the award made under loss of expectation of life from that made under loss of dependency thereby occasioning double entitlement.

3. On the issue of income Counsel submitted that the respondent did not produce any documentation, bank records or books of account to prove that the deceased used to earn Kshs 15,000/= a month. Counsel submitted that in the absence of such proof the court ought to adopt the minimum wage which at the material time was Kshs 5,000/=.

4. On the multiplier Counsel submitted that the 30 years adopted by the trial court did not take into account that life expectancy has been greatly reduced by the incidences of poverty, road accidents, AIDS and other terminal diseases and submitted that the court should have adopted a multiplier of 28 years. Counsel however conceded the dependency ratio of 2/3 and calculated damages under that head as follows:

$$5,000 \times 12 \times 28 \times 2/3 = \text{Kshs } 1,120,000/=$$

Counsel then urged this court to deduct the award for loss of expectation of life from the above sum and relied on the following case to support that submission:

- **Charles Omwenga Ongiri & another vs Daniel Muniko [2017] eKLR.**

Counsel urged this court to allow the appeal as prayed.

5. The appeal was vehemently opposed. Counsel for the respondent disputed that the trial court had adopted a multiplier of Kshs 15,000/= and submitted that the Kshs 8,000/= adopted by the court was on the lower side as the court ought to have adopted the Kshs 12,000/=

minimum wage of a general labourer. On this, Counsel cited the case of **Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita & another (2011) eKLR** and the **Regulation of Wages (general) Order 2017**.

6. On the multiplier counsel submitted that the trial Magistrate did not err and cited the case of **Mildred Aori Odunga v Hussein Dairy Limited [2017] eKLR**.

7. In regard to deduction of the award for loss of expectation of life Counsel submitted there was no need for such deduction and cited the case of **Richard Matheka Musyoka & another v Susan Aoko & another (suing as the administrators of Joseph Onyango Owiti - deceased) [2017] eKLR** where Majanja J held:

“The principal does not mean a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act hence the issue of duplication does not arise regarding that aspect of the award.”

8. In conclusion Counsel urged this court to dismiss the appeal with costs to the respondent.

9. The principles that guide a court in considering an appeal such this are that the assessment of damages is a discretionary exercise and **“an appellate court should be slow to interfere unless it is satisfied that either the trial court took into account an irrelevant factor or left out a relevant factor or that the award was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”** See **Butt v Khan [1981] KLR 349**.

10. The first issue in contention is the income adopted by the trial Magistrate. On this, it is my finding that the learned trial magistrate having correctly found there was no evidence to prove the deceased’s income should have resorted to the minimum wage. As the deceased died on 22nd December 2016 the minimum wage applicable was Kshs 5,844.2 as set out in **Legal Notice No 116 dated 26th June 2015**.

11. As for the multiplier the deceased being a trader who was not restricted by the mandatory retirement age would most likely have worked beyond sixty years. The death certificate indicates she died at 27 years and in my view the multiplier adopted by the trial magistrate is reasonable and so is the 2/3 dependency ratio. Accordingly, damages for loss of dependency will be as follows:

Kshs 5,844.2 x 30 x 12 x 2/3=Kshs 1,402,608/=

12. Damages awarded for pain and suffering and for loss of expectation of life were not in contention and shall remain undisturbed.

On the argument that the award for loss of expectation of life ought to have been subtracted from the award under the Fatal Accidents Act I must heed the exhortation of the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** that:

“[20] This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

13. Accordingly, this appeal succeeds only to the extent that the award for loss of dependency is reduced and judgment for the respondent shall now be as follows:

Special damages	Nil
Pain and suffering	45,000
Loss of expectation of life	150,000
Loss of dependency	<u>1,402,608</u>
Total	<u>1,597,608</u>
Less 30%	615,782.4
Net Award	<u>981,825.6</u>

14. The net award for loss of dependency shall be shared equally between the three children of the deceased and as they are still minors their respective shares shall be invested in interest earning accounts in a reputable bank or institution in the joint names of the Executive Officer of Keroka Court and the administrator of the estate. That is not to say that the children shall also not be beneficiaries of the sums awarded under the Law Reform Act.

15. As the appellant succeeded only partially I shall order that he shall get half the costs of this appeal. It is so ordered.

Signed, dated and delivered in open court this 14th day of November 2019.

E. N. MAINA

JUDGE