



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 8 OF 2018

DAVID KIMANI GITHINJI & GRACE MBAILE, (suing

as the administrator of the estate of Catherine

Njeri Kimani) Deceased.....APPELLANTS

VERSUS

MUTAI HARDWARE STORES LIMITED.....RESPONDENT

(Being an appeal from the judgment of Honourable Z. Abdul (RM) delivered on the 16th January, 2018 in Naivasha CMCC No. 387 of 2016)

JUDGMENT

Background

1. This appeal seeks prayers that:

“1. The lower court assessment on the loss of dependency and special damages be set aside and the same be enhanced by the court

2. Costs of the appeal”

2. The brief facts of the case are that the deceased was travelling in a vehicle registration number KAD 650W which was involved in a fatal accident on 22/2/2014 along Maai Mahiu - Narok road. At the hearing in the lower court, both appellants testified while one witness testified for the respondent. The defendant/respondent was found 100% liable, and the court awarded damages as follows:

1. Pain and suffering Kshs 20,000.00
2. Loss of expectation of life Kshs 150,000.00
3. Loss of Dependency Kshs 869,760.00
4. Special Damages Kshs 35,650.00

Total Kshs 1,075,410.00

3. The appellant’s appeal seeks to enhance the damages awarded, on the following grounds:

1. The learned Magistrate erred in both law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.

2. The learned Magistrate erred in fact and law in resorting to the minimum wage reserved for unskilled workers when there was ample evidence the deceased was a businesswoman.

3. *The learned Magistrate erred in both law and fact in applying a minimum wage that was not applicable at the time of the deceased death.*

4. *The learned Magistrate erred in both law and fact in failing to award funeral expenses.*

5. *The learned magistrate erred in law in awarding damages which were so in-ordinately low as to represent an entirely erroneous estimate of the compensation due to the deceased estate.*

4. The duty of the court in a first appeal was stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally” (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

5. I must take the caution, whilst subjecting the evidence herein to re-appraisal, that this court did not have the opportunity of seeing and hearing the witnesses first hand. Further, that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. I will deal with each of the two area under appeal; namely Minimum wages and Funeral expenses, as follows

Minimum Wage

7. The appellant argues that the trial magistrate was wrong in applying a minimum wage, because the evidence was that the deceased together with appellant were hawkers who made about Kshs 24,000/= monthly from their hawking businesses. Further, the appellant argued that the minimum wage used applied to unskilled employees in the agricultural sector, while the deceased was not engaged in the agricultural sector.

8. That the deceased was a hawker was not disputed in the evidence. Nor was it disputed that documentary evidence to show how much money the deceased earned was not provided. In the absence of documentary evidence to prove income, legal authorities have stated that a court in pursuit of justice must appreciate the fact that there are many people in our society today who are illiterate and do not have documentary evidence in proof of their incomes. The lack of such documentation in such an environment should not be taken to suggest that such person did not earn a living. (See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited Court of Appeal at Nyeri Civil Appeal No. 22 of 2014 (2015) eKLR** among others).

9. In the absence of clear documentary proof of income, a Court ought not to merely disregard the claim as though the claimant or deceased had no livelihood at all. That would lead to injustice of great proportions. In such case the court correctly ought to revert to the applicable Regulation of Wages Order or to a global figure in appropriate cases, for instance, when the deceased is a minor.

10. In this case, the deceased was an adult and a hawker. That is undisputed. She died from a fatal accident on 22/2/2014. That is also undisputed. Thus the court could safely revert to the appropriate Regulation of Wages Order, which here would be in the general category, namely, **The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197)**. This Order was applicable in 2014. In my view, the deceased falls under the category of general labourers within the Municipalities since Naivasha is deemed a municipality. The monthly income under that Order was Kshs. 9,024.15/=. Which ought to be used in the calculation of the award of damages.

11. There was little distinction between the parties on the dependency ratio (2/3) and the multiplier used of 20 years. The calculation would therefore be:

$$9,024.15 \times 20 \times 12 \times 2/3 = 1,444,024/=$$

12. The appellant’s argument that the **Regulation of Wages (General) (Amendment) Order, 2015** should be used, cannot hold in the circumstances, as the deceased died in 2014 and the applicable Wages Order at the time of his death was the 2013 Order.

13. I thus find that the trial magistrate erred in using wrong legal provisions by applying the minimum wage under The Regulation of Wages (General) (Amendment) Order, 2015 for unskilled employees and also erred in the wage amount.

Funeral Expenses

14. The appellants fault the court for not awarding Kshs. 30,000/= for funeral expenses as the reasonably accepted norm. On this, I have to agree with the Appellants that funeral expenses are a legitimate cost well recognized in such cases.

15. In the case of **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR**, the court awarded the plaintiff Kshs. 60,000/= for

funeral expenses and held:

“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the KShs. 60,000/= we have awarded herein apply strictly to the circumstances of this case.”

16. The point need not be belaboured. It is well recognized that expenditure for burials in the African society is a rule rather than the exception. Burials in the African setting generally, but not always, cover costs such as coffin, mortuary costs, transporting the body, interment costs and so on. I am of the view that an award for funeral expenses can be made even in the absence of receipts as long as the amount is pleaded, and it is shown that there was a body to bury, and the amount claimed is reasonable. Similarly, the award made must be reasonable in the circumstances.

17. Funeral expenses may be taken into account under the **Law Reform Act** which provides at **Section 2 (2) (c)** as follows:-

“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 consequent on his death, except that a sum in respect of funeral expenses may be included.”

18. I have seen from P Exb 5 Narok Hospital charge sheet that there was a mortuary fee for 6 days, an embalment fee and post mortem fee all suggesting that there was a body that had to be buried. Although there are no funeral receipts, I find the amount pleaded as funeral expenses of Kshs. 30,000/= to be reasonable. I award the same.

19. Thus the total award under special damages shall be 65,650/=.

Disposition

20. In conclusion, on both the awards for loss of dependency and special damages which includes funeral cost, this court has made findings that are different from those made in the lower court.

21. Accordingly, I would set aside the award of the trial court, and substitute it with the following award:

Pain and suffering	Kshs	20,000.00
Loss of expectation of life	Kshs	150,000.00
Loss of Dependency	Kshs	1,444,024.00
Special Damages	Kshs	<u>65,650.00</u>
Total Award	Kshs	1,679,674.00

22. The plaintiff/appellant shall be entitled to an award of Kshs 1,679,674/=, and the costs of the appeal.

23. Orders accordingly.

Dated and Delivered at Naivasha this 5th Day of December, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No Representation for the Appellant
2. Ms Karanja for the Respondent
3. Court Clerk - Quinter Ogotu