



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 39B OF 2016**

**JOEL KIRWA KAZI.....APPELLANT**

**VERSUS**

**GRACE CHEPKETER ROTICH &**

**DANIEL BII (Suing as the legal**

**representative of the estate of SIMON KIBET ROTICH).....DEFENDANT**

*(An appeal arising from the judgment of Honourable. G.A odhiambo (RM) in Kapsabet PMCC NO.163 of 2013 delivered on 16/2/2017)*

**JUDGMENT**

The appellant filed the present appeal being dissatisfied with the decision of the trial court in KAPSABET PMCCC CASE NO. 163 OF 2013. The judgment was delivered on 16<sup>th</sup> February 2016 in favour of the respondent wherein the respondent was awarded Kshs. 547,425/- and costs of the suit. The claim arose from an accident that resulted in a fatality.

**APPELLANT'S CASE**

The appellant submitted that it is trite law that special damages must be specifically pleaded and proven. He cited the case of *Maritim & Another v Anjer* in support of his submissions. The respondent pleaded specifically for funeral expenses but did not produce receipts as proof of the funeral expenses incurred. The amount of Kshs. 24,350/- pleaded as funeral expenses is excessive and unreasonable given that the plaintiff only produced the Nandi Hills District Hospital receipt of Kshs. 200/-, Kapsabet District Hospital Mortuary charges at Kshs. 2,500 and Kapsabet District hospital charges at Kshs 1,500/-. The court should award Kshs. 4,200 as the amount proved.

The appellant relied on the definition of loss of consortium as per the Black's Law Dictionary. He cited the case of Best v Fox and submitted that a wife is not entitled to loss of consortium. The magistrate's court erred in awarding Kshs. 200,000/- for loss of consortium.

The deceased was a tea plucker and payslips were produced indicating that he earned an average of Kshs. 5,000 per month. The appellant did not dispute the multiplicand of Kshs. 5,000/-. He disputed the use of a multiplier of 12 years which was the total years remaining for the deceased to retire.

A multiplier of 5 years would have been reasonable taking into account the age of the deceased and the vicissitudes of life. He relied on the case of *Danty v Haji & another (2005) 1EA 43*.

Dependency must be proved by evidence. The respondent produced birth certificates as PExh 8a and 8b to show the deceased had dependants. A dependency ration of 2/5 would be reasonable in the circumstances. A sum of 5000 x 5 years x 12 months x 2/5 = 120,000/= is reasonable as an award for lost years.

The deceased died immediately after the accident. The plaintiff testifies that he found the deceased at the mortuary as per page 82 of the record of appeal. There is no evidence that the deceased was admitted at the hospital before his demise. The trial court erred by awarding a sum of kshs. 150,000/- as an award for pain and suffering where the deceased did not undergo pain and suffering. He relied on the case of *Charles Masoso Barasa & Another v Chepkoech Rotich & Another [2014] EKLR*. A sum of Kshs. 10,000/- would have been sufficient.

The learned magistrate erred in awarding Kshs. 200,000/- for loss of expectation of life under the Law Reform Act given the life expectancy in Kenya and the fact that the deceased was 48 years old. The appellant relied on the case of *Jemimah Wambui Njoroge v Philip Mwangi (1999) eKLR* and the case of *George Moga v Nairobi Women's Hospital & 3 others (2015) eKLR* where the courts awarded Kshs. 60,000/- and 100,000/- respectively. He proposed a sum of Kshs. 100,000/-. Further, that the court should not award any amount under this head as this would amount to double compensation.

The total amount of damages that the respondent should be awarded should be kshs. 127,350.00/-.

## **RESPONDENT'S CASE**

The respondent filed submissions on 7<sup>th</sup> August 2019.

The respondents submitted that courts have often taken judicial notice that during burial ceremonies the families of deceased persons incur expenses which may not be possible to prove by way of receipt. The court relied on the authority of *Jacob Ayiga Maruja & Anor v Simeon Obayo (2005) eKLR*. The amount of Kshs. 20,000/- is not excessive and should be upheld.

The trial court did not err in awarding the sum of Kshs. 200,000/- for loss of consortium. The trial magistrate relied on the case of *Paul Kisiko v Samuel Karinga & 2 others (2012) eKLR* where the court awarded a sum of Kshs. 200,000/-.

The trial magistrate did not err in awarding Kshs. 480,000/- for lost years. There is nothing to show that the trial court erred in exercising its discretion in adopting the multiplier of 12 years. The appellants did not provide any evidence to show any vicissitudes of life that could have caused the deceased to have an early demise. They relied on the case of *Benedeta Wanjiru Kimani v Changwon Cheboi & Anor, Nakuru HCCC No. 373 of 2005*.

The appellants' submission on a dependency ratio of 2:5 has no basis in law. The evidence of the dependants was proven beyond doubt.

The sum of Kshs. 150,000/- is sufficient for pain and suffering. The trial magistrate noted that there was a long delay on the way when the deceased was being taken to the hospital and when they made it to the hospital he was pronounced dead. The trial court relied on the evidence of

DW1 that the vehicle taking the deceased to the hospital ran out of fuel and they had to wait for 30 minutes. He suffered immense pain, and was pronounced dead upon arrival at the hospital. He did not die on the spot.

Under the limb of expectation of life, the appellant contradicts himself. He submits that the court should award Kshs. 100,000 then submits that the court should not award any damages as it would amount to double compensation. The deceased was not elderly and was healthy, he could have lived a long and happy life.

On the issue of double compensation, the respondents relied on the case of *Chen Wembo and 2 others v I.K.K and another (suing as the legal representative and administrators of the estate of RK (Deceased) (2017) eKLR*.

The respondents submitted on their cross appeal on liability. There was no basis for awarding liability at 50:50. PW2's testimony proved that the driver of KAV 132S was liable for the accident. The trial magistrate misdirected herself in disregarding the evidence of the only independent witness. A glance at the testimony of DW1 raises a lot of doubt. He claimed the deceased looked behind by turning his face to the right and lost control. The deceased was in total control of the bicycle and could not lose control as suggested.

The learned magistrate faulted the police officer PW3 for failing to assist the court with evidence on what actually occurred. She implied that the evidence of PW2, the eye witness was not reliable. In her judgment she did not give reasons why she thought the witness was not reliable. That she erred in failing to find that the evidence of PW2 was not admissible. She also erred in finding the evidence of DW2 admissible. They cited the case of *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others (2018) eKLR*. the trial court erred in finding liability at 50:50.

## **ISSUES FOR DETERMINATION**

- a) Whether the award of funeral expenses was excessive.
- b) Whether the trial court erred in awarding damages for loss of consortium.
- c) Whether the award for Lost years was excessive.
- d) Whether the award for damages for pain and suffering was excessive.
- e) Whether cross-appeal on liability is merited.
- f) Whether the award for damages for loss of expectation of life was excessive

## **WHETHER THE AWARD FOR DAMAGES FOR FUNERAL EXPENSES WAS EXCESSIVE**

It is trite law that special damages must be pleaded and proven specifically. However, in *Jacob Ayiga Maruja v Simeon Obayo (2005) eKLR*, the court of appeal held;

**'We agree and the courts have always recognized that a reasonable award ought to be made in respect of legitimate funeral expenses.'**

Notably, in the case cited above, the amount was reduced to Kshs. 60,000/- from an amount of Kshs. 117,325/-. The same was a bill from the church for funeral expenses.

I find that the award of Kshs. 20,000/- was not excessive and this ground of appeal fails.

#### **WHETHER THE TRIAL COURT ERRED IN AWARDING DAMAGES FOR LOSS OF CONSORTIUM**

The appellant has not provided an authority from Kenya to buttress the submission that damages for loss of consortium are only awarded to the husband. In *Paul Kisiko vs Samuel Karinga & 2 others (2012) ECLR* the court awarded the widow of the deceased kshs. 100,000/- as damages for loss of consortium. The appellant has not convinced the court that the award was excessive or went against any set down principles or case law.

#### **WHETHER THE DAMAGES AWARDED FOR LOST YEARS WERE EXCESSIVE**

The appellant's contention was on the multiplier of 12 years. He did not dispute the multiplicand of Kshs. 5,000/-.

In *Benedeta Wanjiru Kimani v Changwon Cheboi & Anor, Nakuru HCCC No. 373 of 2005* the court held that the defendants had adduced no evidence of the vicissitudes of life or other imponderables which would have shortened the deceased's working life. Equally in the present appeal, the appellants have not provided any proof that there were vicissitudes of life or other imponderables that would have shortened the deceased's life. I find that the multiplier was in order. The dependency ratio is a conventional ratio and the appellant has not proven that the trial court erred in its findings on the same.

#### **WHETHER THE AWARD OF DAMAGES FOR PAIN AND SUFFERING WAS EXCESSIVE**

The trial court awarded Kshs. 150,000 as damages for pain and suffering. As per page 103 of the record of appeal it is evident that there was a delay in taking the deceased to hospital. There is no evidence that he died on the spot. Further, first aid was conducted on the spot meaning he was still alive before being taken to hospital. The appellant has not proven that the award of damages for pain and suffering was excessive in the circumstances.

#### **WHETHER THE AWARD OF DAMAGES FOR LOSS OF EXPECTATION OF LIFE WAS EXCESSIVE**

The appellant contradicted himself by submitting that the court should award kshs. 100,000/- and later on submitting and not without prejudice, that the court should not award any sum as it would amount to double consideration.

In *Kemfro Africa Ltd T/A Meru express Services 1976 & Another v A.M Lubia & Another (No.2) (1987) KLR 30* the court of appeal held;

*“An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents; it appears the legislation intended that it should be considered.*

*The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death..... The deduction of the entire amounts made under the LRA in this case was erroneous...”*

In the premises the appellants' claim that there was double compensation does not hold water.

#### **WHETHER THE RESPONDENT'S CROSS-APPEAL ON LIABILITY IS MERITED**

The respondents cross appealed on liability, claiming that the trial court erred in apportioning liability at 50:50 as there had been uncontroverted and independent testimony by PW2 who witnessed the accident, that the driver of KAV 132S was to blame for the accident.

In *Lakhamshi v Attorney General (1971) E.A 118*, the Court of Appeal held;

**I accept that a judge is under a duty when confronted by conflicting evidence to reach a decision on it. I accept that in relation to most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence.**

In *Peter Okello Omedi V Clement Ochieng [2006] ECLR* the court held;

**The failure by both parties to observe their respective obligations to each other might have caused the accident and in the absence of clear and uncontroverted evidence, I set aside the apportionment of liability by the trial Court and substitute with 50/50 against each party.**

Given that the police officer who investigated the accident was unable to produce a sketch of the accident and did not conduct thorough investigations as by the time she went to the scene the vehicle had been removed, I find that the trial court had difficulty determining liability

conclusively. I therefore find that the trial court did not err in apportionment of liability. In the premises, the cross appeal fails.

The appeal lacks merit and is therefore dismissed with costs to the respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 16<sup>th</sup> day of December, 2019**

In the presence of:

Mr. Juma holding brief for Mr. Kamau for the appellant

Miss Keter for the respondent

Ms Abigael – Court assistant

**Mr. Juma:-**

We pray for 30 days stay.

**COURT:**

30 days stay is granted.

**S.M GITHINJI**

**JUDGE**