REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 101 OF 2018

MUROKI DOMMION STANELY.....1ST APPELLANT

STANELY NJARA B. INEBU.....2ND APPELLANT

(Both suing as Legal Representatives of the Estate of DOREEN KAGENDO alias KANGENDO DOREEN (Deceased)

VERSUS

JOHN KIRINYA NAIRUTI .....RESPONDENT

(Being an appeal from the judgement and decree of Hon. M.K.N.N Maroro, PM delivered on 2/8/2018 at Meru Chief Magistrates Court Civil Case No. 385 of 2015)

JUDGMENT

Introduction

1. This appeal arises from the Judgement in Meru CMCC 385 of 2015. The facts of the case were that on 25/2/2015 along the Meru Makutano Road, near Meru primary School Doreen Kagendo while walking was fatally injured by motor vehicle registration No. KBD 521P Isuzu lorry which veered off the road. The matter was heard and the learned trial Magistrate found the respondent's driver 100% liable for the accident, and made the following orders on quantum;

a. Loss of dependency - Kshs 771,434.4

b. Special Damages - Kshs 73,580

c. Pain and suffering - Kshs 50,000

d. Loss of expectation of Life - Kshs 100,000

TOTAL **Kshs 995,014.40**

Appeal on quantum

2. The appellant having been aggrieved by the trial magistrate's decision specifically on the assessment of damages filed this appeal on the following grounds;

a. The trial magistrate erred in law in assessment of general damages in that she did not follow the practice in Kenya that a married deceased with a child would attract the formula of 2/3 and not 1/3.

b. The trial magistrate erred in law and fact in finding that the deceased who had a child and her husband had no dependents or dependency was not clear.

c. The trial magistrate erred in law and fact in not finding that the retirement age in Kenya is 60 years and the deceased has 38 years to work.

Submissions

3. The appellants in their submissions argued that it was clear from the pleadings and evidence that the deceased was married to Muroki Stanely and they sired a daughter Lorna Ntinyari Muroki and further the deceased died whilst pregnant. Therefore, the multiplicand should be 2/3 and not 1/3. The deceased unfortunately met her death at the age of 22 years and in determining the right multiplier the right approach is to consider the age of the deceased, the balance of earning life and the age of the dependents. Thus the right multiplier should have been 38 as the retirement age is 60 years. In addition, they had proposed that the deceased be treated as a general laborer as they were unable to bring out all the evidence on her earnings. They suggested and proposed the minimum wage in the sum of Kshs. 11,000 and in total the amount payable would be Kshs. 2,000,156.

4. The respondents on the other hand argued in their submissions that the issue of dependency is a question of fact that must be proved and the record shows that the 1st appellant in this matter failed to sufficiently prove his marital status to the deceased and moreover he did not adduce evidence that the alleged minor was a child of the deceased. In support they cited the case of **Martin Mburugu Kariuki V. Kanario Mercy Chochora & Another [2018] eKLR.**

5. The respondents further contended that the age or marital status of a dependent cannot be used to determine the dependency ratio as evidence must be tendered to prove the extent of dependency and each case has to be decided on its own merits. There was no proof as to the deceased's source of income and the appellants prayer that the deceased be treated as a general laborer with a minimum salary of Kshs. 10,954.70 which they rounded off to 11,000 does not apply to this case as it is specific to Nairobi, Mombasa and Kisumu areas which the deceased neither resided nor worked. Finally, to argue that the deceased would have lived to the age of 60 years is speculative and the appellant in praying for a multiplier of 38 to be used is to assume that the deceased life would have been guaranteed to the retirement age in Kenya which is 60 years.

Analysis and determination.

6. This appeal is on quantum of damages. The test was stated in the case of **Butt vs. Khan (1977) 1 KAR**, 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 so arrived at a figure which was either inordinately high or low."**

7. In assessment of dependency, the relevant considerations were stated by the Court of Appeal in **Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749** to be**:-**

> **" The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."**

8. Having perused the record, I do not find such clear evidence on dependency. PW1 stated that they were married on 7th July 2013 in church but he had not been asked to bring the certificate of marriage by his legal counsel. Dependency is a matter of fact that should be anchored on evidence. Although he did not produce certificate of marriage, evidence showed that they were husband and wife. PW2, the father in law of the deceased confirmed this. But what I find disturbing is that the trial magistrate adopted a minimum wage of 5,844.20 in accordance with Legal Notice No. 117 Of 26th June 2017, the Regulation of Wages (General) (Amendment) 2015 when the evidence was that the deceased was a student in a beauty school and was to become a professional beauty therapist. There was however no evidence on which an estimate of earnings by such person would have been.

9. In such circumstances, multiplier method was not appropriate because dependency, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. See what Ringera J (as he then was) stated in the case of **Kwanzia Vs Ngalali Mutua & another** that:

> **"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."**

10. In light of the above, the trial court should not have insisted on using the multiplier method to assess dependency. This was a perfect case for a global award. Therefore, taking into account the age of the deceased which was 22 years, the fact that there were prospects of finishing school and becoming a professional beauty therapist, the fact that she used to assist PW1, I award a sum of Kshs. 1,000,000 for loss of dependency. I therefore set aside the award of dependency only. All the other items remain as were awarded by the trial court.

11. The appeal therefore succeeds to the extent I have stated. Accordingly, each party will bear own costs of the appeal.

Dated, signed and delivered at Meru in open court this 5th day of December, 2019

F. GIKONYO

JUDGE

In presence of

Gachuki for respondent

Basilio for Rimita for appellant

F. GIKONYO

JUDGE