



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 35A OF 2017

STEVE ONGINGO.....1ST APPELLANT

ROSEMARY AKINYI ONGINGO.....2ND APPELLANT

VERSUS

SUSAN ADONGO OTIENO aka SUSAN ADONGO OBARA....1ST RESPONDENT

GRACE CONNICE KOLA OTIENO (suing as a legal representatives/

administrator of the estate of Polycarp Otieno Omenda).....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 222 of 2014 Delivered by Hon. T. Obutu (PM) on 24th March, 2017)

JUDGMENT

1. **SUSAN ADONGO OTIENO aka SUSAN ADONGO OBARA and GRACE CONNICE KOLA OTIENO (hereinafter referred to as respondents)** sued **STEVE ONGINGO and ROSEMARY AKINYI ONGINGO (hereinafter referred to as appellants)** in the lower court claiming damages for fatal injuries suffered by **Polycarp Otieno Omenda**, their husband and father respectively, on 8.2.13 when motor vehicle KBF 701D that he was travelling in collided with appellants' motor vehicle KBN 945P allegedly due to the negligence of the 1st appellant.

2. The defendants/appellants filed a joint statement of Defence and denied the claim.

3. Liability was agreed by consent at 75:25% in favor of respondents against the appellants. In a judgment delivered on **24th March, 2017**, the trial awarded damages in the sum of Kshs.2,086,107/- after deducting 25% contributory negligence.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 18.4.17 filed the Memorandum of Appeal dated 17.4.17 which sets out 7 grounds of appeal that may be summarized into the following 3 grounds that:-

1) The quantum on loss of dependency is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice

2) The Learned trial Magistrate erred in law and in fact in reaching at a dependency ratio of 2/3

3) The Learned trial Magistrate erred in awarding damages both under the Law Reform Act and Fatal Accidents Act

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. On loss of dependency, appellants urged the court to adopt a multiplier of $\frac{1}{2}$ since both the deceased and 1st respondent were employed and that 1st respondent was earning more than the deceased. They relied on ***James Mukolo Elisha & Another V Thomas Martin Kibisu Court of Appeal at Nairobi Civil Appeal No. 31 of 2006, .B.S. & I.N.S. vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others***

[2016] eKLR and Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1438 of 1998 (unreported) where the courts held that the extent of dependency is a question of fact to be established in each case.

7. Appellants further fault the trial court for deducting the sum of Kshs. 100,000/- and adding the same sum during tallying.

Respondent's submissions

8. It was submitted for the respondents that the trial court correctly applied the multiplier of 2/3 and that any deduction of damages under the Law Reform Act would be a miscarriage of justice. Respondents placed reliance on Hellen Waruguru Waweru (Suing As The Legal Representative Of Peter Waweru Menja (Deceased Vs. Kiarie Shoe Stores Limited Nyeri Civil Appeal 22 OF 2014).

Analysis and Determination

9. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR). It then behooves this court to summarize the evidence that was tendered before the trial court.

10. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See Kemfro Africa Ltd v Meru Express Service Gathogo Kanini v. A.M. Lubia and Olive Lubia (1985) 1KAR) and Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004).

11. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of the dependency ratio and whether the court should make awards both under the Fatal Accidents Act and Law Reform Act.

a. Dependency ratio

12. I am persuaded by the holding in James Mukolo Elisha & Another V Thomas Martin Kibisu; B.S. & I.N.S. vs Archdiocese of Nairobi Kenya Registered Trustees & 2 and Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another that the extent of dependency is a question of fact to be established in each case. 1st respondent confirmed that she and the deceased were employed and that she was earning more than the deceased. There was no evidence that deceased was taking most of the responsibilities as compared to the 1st respondent who was earning more and I agree with the appellants' submission that the trial magistrate's finding to that effect was a point in the wrong direction and that a dependency ratio of ½ would be appropriate in this case.

b. Award under the Fatal Accidents Act and Law Reform Act

13. In Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited (Supra)) the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

"...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

14. In the case of David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR, Mativo J, had this to say about Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act

"I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act."

15. The judge cited in Richard Omeyo Omino vs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007 with approval, where Karanja Jin discussing the provisions of Section 2 (5) of the Law Reform Act stated:-

"The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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 words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no

requirement in law or otherwise for him to engage in a mathematical deduction."

16. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

DISPOSITION

17. In view of the finding I have made, the appeal partially succeeds. I substitute the judgment of the trial court on dependency ratio with 1/2. I find no error in the trial court's tally of the final award.

18. Since appellant has partially succeeded, each party shall bear its own costs of the appeal.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF July 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellants - Ms. Barasa

For Respondents - N/A