



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 9 OF 2016

IRENE MICERE MUCIRA.....APPELLANT

V E R S U S

TIMSALES HOLDINGS LTD

ENKE MANAGEMENT LTD.....RESPONDENT

JUDGMENT

The appellant Irene Michere Muchira had filed a case against the respondent Timsales Holding Limited before the Principal Magistrate's Court at Wang'uru Civil Case No. 97/2014 claiming damages for fatal injuries sustained by Alice Waruguru Micere in a road Traffic accident which occurred on 28/12/2013. The appellant had filed a suit as the legal representative in the estate of the late Alice Waruguru Micere, who was a pedestrian and was hit by a motor vehicle registration number KBP 254T which was owned by the defendant and sustained fatal injuries as a result of which she died.

When the parties appeared before the trial Magistrate on 1/12/15 a consent on liability was entered against the defendant in favour of the plaintiff in the ratio of 35% and 65% against the defendant. On quantum, the court awarded the appellant damages as follows:-

a) **Loss of dependency:** Kshs.388,320/=

The trial magistrate held that the deceased was aged 19 years and did not have any formal employment therefore multiplier of 20 years was applied. He applied minimum wage of Kshs.4,854/= with a ratio of 1/3.

$4,854 \times 12 \times 20 \times 1/3 = \text{Kshs.}388,320/=$

b) **Loss of expectation of life:** Kshs.50,000/=

c) **Pain and suffering:** Kshs.20,000/=

Deceased died immediately at the scene

d) **Special damages:** Kshs.58,000/=.

Total of Kshs.516,320/= less 35% = Kshs.335,608.

The appellant was dissatisfied with the Judgment of the trial Magistrate on quantum and filed this appeal raising the following grounds:-

1. The learned trial Magistrate erred in fact and in law in misdirecting himself by failing to take into account all the relevant factors involved in the case in addressing quantum hence arrived at the wrong conclusion where the assessment was so in-ordinately low as to represent a fair award in the circumstances.
2. The learned trial Magistrate erred in fact and in law in failing to consider the evidence available hence arrived at the wrong conclusion.
3. The learned trial Magistrate erred in fact and in law in applying a wrong multiplier and multiplicand that had no basis in the evidence or law hence arriving at the wrong conclusion in the matter.

4. The learned trial Magistrate erred in taking into account irrelevant factors thereby arriving at the wrong assessment.

The appellant prays that the appeal be allowed, Judgment of the trial Magistrate be set aside and appropriately reviewed.

The issue which arises in this appeal is assessment of damages and whether this court should interfere with assessment of damages by the trial Magistrate. This issue has been addressed in binding decisions of the Court of Appeal.

In the celebrated case of ***Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia [1982-88] KLR 727*** the Court of Appeal held:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

This was also addressed in the case of ***Power Lighting Company Ltd & Another v Zakayo Saitoti Naingola & Another [2008] eKLR***

The court held;

On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages

(1) Damages should not be inordinately too high or too low.

(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....

This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others

- The award is inordinately too high or too low.

- It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses

- Calling for proof of the same by visual observation if pointed out and medical records

- By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident on the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum.

In his submissions counsel for the appellant submits that it was proposed that basic minimum monthly wage be used as a general guideline in assessing damages for lost years and loss of dependency. That it was generally agreed between the parties and which the court adopted, that owing to the deceased's informal nature of employment it was not easy to arrive at the basic figure on earnings. It was submitted that the figure applied by the trial Magistrate was wrong which was a gross misconception and an obvious error of law which should not be allowed to stand.

It was incumbent upon the trial Magistrate to apply the correct figure of the minimum wage. The trial Magistrate applied a minimum wage of KShs 4,854/- and died on the Legal Notice No. 196 '***Regulation of Wages (Agricultural Industry (Amendment) Order 2013***' clause (a) which deals with basic minimum monthly wages and for General Labourer, the 4th Column gives the wage as KShs 5,218/-. In the testimony of the appellant, she stated that the deceased used to do farming and did odd jobs. The trial Magistrate relied on wages for Agricultural Industry. The deceased was not in the category of general labourer as she was a farmer. The figure applied by the trial Magistrate in the Agricultural Industry. If you consider No. -1- it refer to unskilled employee. The minimum wage was a guideline as strictly speaking she was not an employee. I find that since the deceased was doing farming, she falls under category (1) of the '***Regulation of Wages (General) (Amendment) Order 2013***' which prescribes a wage of KShs 10,071.00/- for ungraded employee. This is a proper fall back since the parties had agreed that it was not possible to assess her income. I agree with the appellants that the figure applied by the trial Magistrate that is KShs 4,854/- was wrong and an obvious error which allows me to interfere with the award.

The appellants raised the issue of the multiplier which was applied by the trial court. The deceased was aged nineteen (19) years at the time she met her unfortunate death. The appellant submits that the multiplier of 20 years was inordinately low as to represent a fair assessment. The appellant proposes a multiplier of 30 years.

I have looked at persuasive decisions on the subject. In the case of ***Steve Tito Mwasya & another (both suing as legal representatives of***

the estate of S K T (Deceased) v Rosemary Mwasya [2015] eKLR

In a similar case where deceased was aged 19 years, the court calculated damages as hereunder;

It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been earned by the deceased, less the living expenses, assuming that one lived and worked upto the age of retirement. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the defendant agree that the dependency ration should be 1/3. On the head of lost years I make the award as follows:

118,564X30X1/3X12=14,227,680.

(c) Loss of expectation of life

The deceased was young and healthy and would have probably lived a long and happy life..... Taking into consideration the authorities quoted, I award Kshs. 100,000/= as general damages under this head which I find to be fair.

Zachary Achachi Nyakundi V Kimilili Hauliers Limited & Another [2013] eKLR

The deceased was aged 21 years, the court calculated damages as hereunder;

With regard to loss of expectation of life, the reasonable award has been between KShs.80,000/= to KShs.150,000/=. I do find that based on the authorities relied upon by the parties, a sum of KShs.150,000/= is realistic.....

With regard to loss of dependency,... The deceased was undertaking a degree in Business Studies..... Having adopted a multiplier of 25, I do find that a monthly salary of KShs.25,000/= is realistic. The award for loss of dependency shall be 25,000/= x 1/3 x 12 x 25=3,500,000/=.

Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR

The deceased was aged 24 years, the court calculated damages as hereunder;

The Plaintiff testified that the deceased was 24 years old at the time of her death. She had been employed as an Executive Secretary in the firm of Kilonzo & Company Advocates and according to the pay slip submitted as evidence she was earning a monthly salary of Kshs.10,000/= and this is the sum I adopt as the multiplicand..... he deceased was not married and was survived by her father Arthur Alukwe and mother Alice Alukwe. Therefore, it is my view that she spent half of her salary on living expenses. Consequently, I award Kshs. 1,530,000/= for lost years computed as follows: 10,000 (multiplicand) x 30 years (multiplier) x 12 years x 1/2.....

The deceased was young was young and healthy and would have probably lived a long and happy life..... I award Kshs. 100,000/= as general damages under this head.

The Court applied 30 years after considering the retirement age of 55 years. The estate of the deceased is entitled to lost years. In assessing the lost years, the court considers various factors including the retirement age and other vagaries of life like accidents and illness to arrive at a reasonable figure. The trial Magistrate applied a multiplier of 20 years. This would give the deceased a lifetime of 39 years. At the time of the death the retirement age was and still is sixty years. The deceased was of good health at the time of her death. She would have lived upto the retirement age and enjoy full life. Considering the persuasive decisions I have cited above, I am of the view that the award of the trial court on loss of dependency and loss of expectation of life were so inordinately low and erroneous. I find that a multiplier of 30 years as submitted by the plaintiff would be appropriate. For loss of expectation of life, the above cited decision show awards ranging between Kshs 80,000/-, - Kshs 150,000/-. I find that an award of Kshs 100,000/- is most appropriate and reasonable. The authorities the trial Magistrate relied on to assess the damages for lost years were before year 2000 and he failed to consider inflationary trend and arrived at an inordinately low award.

In Conclusion:-

For the reasons I have stated I find that the appeal has merits and is allowed. I award damages as follows:

- a) Loss of dependency a multiplier of 30 applies with a ratio of 1/3 (this was not in dispute).

That comes to :-

10,071x12x30x1/3 = 1,208,520/-

Loss of expectation of life = 100,000/-

Pain and suffering = 20,000/-

Special damages = 58,000/-

TOTAL = 1,366,540/-

Less 35% = 478,289/-

TOTAL – 65% = 888,251/-

I award costs to the appellant.

Dated at Kerugoya this 11th day of October 2018.

L. W. GITARI

JUDGE