



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 88 OF 2017

ALVIN KURIA GIKONYO.....APPELLANT

VERSUS

KATHINI KIVULU (suing as mother & legal representative of the estate of

JACKSON KAVULU DAUDI.....RESPONDENT

J U D G M E N T

1. In this appeal, ALVIN KURIA GIKONYO challenges the decision of the trial court for failure to consider or adequately consider the submissions and evidence led and in applying wrong principles in assessment of damages for lost dependency and thereby arriving at a figure that was manifestly excessive as to exhibit entirely erroneous estimate of damages.
2. At trial, the Respondent pleaded that the deceased was at his death aged 25 years and self-employed in a curio shop earning a monthly income of Kshs.10,000/=. In evidence the plaintiff (PW 1) said that the deceased used to sell curios at Serena Beach and would earn some Kshs.10,000/= per month. She however had no document to prove such engagement.
3. In the judgment, the trial court analyzed the evidence led as follows:-

“Evidence as adduced by PW 1 was that the deceased used to help him with his salary of Kshs.10,000 further he was 25 years at the time of death.

As per the defendant in their defense they indicated that siblings didn't form part of dependants which can't be disregarded with. As per paragraph 7 of the plaint the deceased was survived by three people as articulated I find a multiplicand of 2/3 as appropriate. It was the defence evidence that the deceased should worked for 25 years at least looking at the current retirement age of Kenyans being 60 years I find the deceased would hence have worked for 30 years as he was young.

As per the earning as at the carrying businesses it was evidence that he would earn Kshs.10,000 which the defence refuses and proposes Kshs.8,000. As per the Labour Institutions Act annexed in the plaintiffs submissions I concur with the same and adopt Kshs.10,000 as this earnings evidence as per plaintiff I find a multiplication of 25 years as appropriate same is adopted.

The sum is as below

10,000 x 2/3 x 25 x 12 = 200,000

= Kshs.2,000,000”.

4. That analysis and determination shows that the trial court applied the Regulation of wages (General)(Amendment) Order 2015 to adopt a multiplier of Kshs.10,000/= as the minimum wage the applicable. Those regulation do not set the wage at Kshs.10,000/= but at Kshs.10,954/= per month.
5. It is of note that the accident and death occurred in 2011 February.

By that time the Regulation of wages order applied had not come into force and could not be applied. The applicable regulations were those issued by legal notice no. 98 of 18/6/2010.

6. To that extent the trial court erred by adopting an inapplicable law and therefore invite the interference by this court to correct that error.

How about the multiplier of 25 years and dependency ratio?

7. The evidence was that at his death the deceased was aged 30 years. He was at that time said to have been in good health. Can it be genuinely said that a multiplier of 25 years was too high as to have the effect of exaggerating the award even if paid in an accelerated manner? I do not think so. A period of 25 years out of the deceased expected and possible remainder of working life of 30 years is to this court reasonable in a matter for discretion. Choice of a multiplier is discretionary matter [1] and the appellate court must be circumspect before seeking to substitute its own discretion from that of the trial court[2].

8. On the dependency ration, the law is that dependency is a matter of fact to be proved by evidence [3]. The evidence led at trial, by PW 1, was that the deceased would assist the plaintiff as much as his other sibilings. The plaint at paragraph 7 listed the mother and two sibilings as dependants to the deceased. To this court only the mother and father could be properly regarded dependants of the deceased pursuant to Section 4 of the Fatal Accidents Act. However that witness did not disclose how much the deceased would sent to the dependants to prove dependency. He was content to say “*He used to assist me and his other sibilings as listed in the plaint*”.

9. That may as well have been lack of diligence on the part of the counsel to lead the litigant properly. Failure to give the extent of assistance does not by itself dis-entitle a deserving plaintiff from being awarded damage calculated on the basis of lost dependency.

10. Way back in 1986, in *Hassan vs Nathan Munungi [1986] LRR 457*, the Court of Appeal, Kneller JA, while appreciating the expectation of Kenyan Parents on their children observed:-

“The fact of the matter is, however, that today parents and children in most Kenyan families to expect their children when adults to help their parents if they need, and in my view, that should be encouraged and not fulminated as a system of gerontocracy at its worst”

11. All the foregoing is said to underscore the ultimate finding that the court being inclined to set aside the award on the basis that it was founded upon misapprehension of the law applicable, this court as a first appellate court has a duty and mandate to re-assess the damages due.

12. Having said that the 2015 Regulation of Wages (General) (Amended) Order did not apply but that it was the 2011 Order which applied, what is the difference? The difference is that the 2014 Regulations placed the minimum wage of a general worker at Kshs.10,954/= while the 2011 pegged it at Kshs.6,743/= per month. That is the multiplicand the trial court was bound to use and which it did not use hence the error in application of the law. I will now use that figure as the multiplicand.

13. On the multiplier, I have held that it being a discretionary matter I am hesitant to interfere with the choice of 25 years. I will retain the same.

14. On dependency, I find that the deceased having been single, would at some stage marry and be more inclined to direct more support to own family. For that reason and even though no exact extent of assistance was proved, I do consider that ½ of his income would be available devoted to the support of his parents. Using those established thresholds the damages for lost dependency would work out as follows:-

$$6743 \times 25 \times 12 \times \frac{1}{2} = 1,011,450/=$$

15. Accordingly, the judgment of the trial court as regards award of damages for lost dependency is set aside and in its place substituted an award of Kshs.1,011,450/=. Since only this head of award was contested the other heads of damages remain undisturbed.

16. On costs, noting that the Appellant has only succeeded to the extent of reducing the total award by about 50%, I award to the appellant ½ of the costs of this appeal.

17. It is so ordered.

Dated and delivered at Mombasa this 16th day of November 2018.

P.J.O. OTIENO

JUDGE

[1] Board of Governors Kangubiri Girls High School vs Jane Wanjiru Muriithi [2014] eKLR

[2] Shah vs Mbogo [1967] EA 116 Pithon Waweru Maina vs Thuku Mugiria [1983] eKLR

[3] Chanibhai J Patel vs P.F. Hayes [195] EA 748

