



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. 3 OF 2012

{Appeal arising from the judgment and decree of Hon. M.N. Gicheru – Chief Magistrate dated 24/01/2012 in original Kitale CMCC 792 OF 2009}

KENGEN LIMITED..... 1ST APPLICANT

MOSES M. KOMBO.....2ND APPLICANT

VERSUS

JANE NESUNGA KHALA (Suing as the personal representative and Administrator
of the estate of **ALEX WEKESA NYONGESA – Deceased** **RESPONDENT**

JUDGMENT

The Respondent brought this suit at the lower court on behalf of the estate of her son Alex Wekesa Nyongesa who died pursuant to a road traffic accident on 23/4/2007 along Kitale – Webuye road at a place called Road Block. The Motor vehicle involved KAQ 609X Toyota Corrolla was owned by the appellants. The matter proceeded to full trial and upon closing their evidence, the parties agreed on the question of liability at 80% in favour of the respondent and 20% against the Appellant. The court assessed damages at Kshs 1,582,240 less 20% hence a grant total of Kshs 1,265, 792 in favour of the respondent.

The Appellant was dissatisfied with the said quantum and has filed this appeal basically arguing that the quantum was too high in the circumstances and that the trial court used wrong principles in arriving at the said award.

The evidence as presented by the respondent showed that the deceased was born on 20/10/1989 and died on 23/4/2007, thus was 17 years and 6 months as at the time of his demise. He was a boda boda rider earning Kshs 500 per day or thereabouts.

His dependants were Mirriam Nabwire, Halima , the sister, Gentrix Nafula his wife and L N the daughter as well as the respondent his mother.

From the evidence it was also alleged by the respondent that the deceased contributed some daily sum of Kshs 80 to their association. He would give Kshs 300 to the respondent to keep and would use Kshs 200 to buy milk, maize and sugar for the respondent.

Generally therefore it appears that although the deceased was a minor he was a responsible young man as he would take care of her mother and her siblings. Although it was alleged that he was married to Gentrix and had a child called L, there was nothing to show that in terms of documentary evidence or even oral evidence. Infact the respondent stated that the said Gentrix and the child were introduced to her after the

demise of Alex.

Analysis and Determination

I have perused the proceedings as well as the legal authorities presented by the parties herein in support of their written submissions. The appellant contends that the award was high in the circumstance and not commensurate to the evidence so far presented.

The age of the deceased was not in dispute as well as what his occupation. However there was nothing to indicate that he supported the respondent and his siblings. There is nothing as clearly submitted by the appellants to show that he paid school fees, medical receipts or any other documents showing that the source of income came from the deceased.

All that the respondent did was to merely present oral evidence in court without any iota of evidence. Infact had the deceased been a member of the association which he contributed on daily a sum of Kshs 80/-, there was no difficulty in any of the members testifying to that effect. Its common knowledge that such associations have some records where they keep indicating their membership as well as their contribution. However rudimentary the records could be, there was no reason why they were not presented in court.

Nor did the respondent attempt to show that the deceased left behind a child and a wife. Nothing was too difficult in presenting such documents like birth certificate, notification of birth or any clinic documents too show that indeed he had a child and therefore a wife to support.

All in all I am not satisfied that the respondent proved that she was dependant on the deceased. Considering that the deceased was a minor that the deceased was a minor it would have been imperative to at least show some semblance of evidence of dependency.

The court in *Jacob Ayiga Ma ruja & Another Vs Simeone Obayo C.A. Civil Appeal No. 167/2002 (2005) eKLR* stated as follows:-

“ We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

I fully concur . However in this instance although there was no documentary evidence, the respondent did not attempt even to proof by calling any independent witness to establish that the deceased was engaged in aboda boda business.

In assessing the damages the trial court adopted a multiplier of 30 years taking into consideration the age of the deceased as 18 years. Ringera J in *Mwanzia VS Ngalali Mutua & Kenya Bus Services (Msa) Ltd & Another* as quoted in *Albert Odowa V Gichuru Gicheny Nakuru HCCA No. 15/2003 (2007) eKLR* found that multiplier is essential when factors such as age and the deceased income as ascertainable. This method may not be foolproof and reliable and it may be abandoned if not relevant to the situation . In the instant case although the age of the deceased was ascertainable his income was not. It was purely speculative and narration by the respondent. Infact the deceased was legally a minor.

In *Mary Khayesi Awalo & Another Vs Mwilu Malingu & Another ELD HCC No 19/1997 (1999) eKLR* Nambuye J (as she then was) stated that;

“ As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of lumpsum award instead of

estimating his income in the absence of proper accounting books.”

In the situation at hand despite not presenting any documentary evidence, I shall state again that the onus was on the respondent to present such strong evidence to show that the deceased was a breadwinner and earned Kshs 500 per month.

Consequently I would set aside the multiplier approach adopted by the trial court and award the respondent a global sum. Taking all the factors into consideration and the age of the deceased whom I still believe was young enough and energetic I would award him a global sum of Kshs 500,000/-. The above figure is based on the fact that there was nothing presented to show the level of his prospects and earnings in the future. The multiplicand approach was inapplicable.

In terms of pain and suffering PW3 an eye witness stated that he died on the spot. I would therefore award a sum of Kshs 10,000/- which is a conventional sum.

The special damages of Kshs 12,240 was proven and the same shall not be distributed.

Conclusion

The appeal therefore succeeds as follows;

- a) General damages Kshs 500,000/-**
 - b) Pain and suffering Kshs 10,000/-**
 - c) Special damages Kshs 12,240/-**
- Total - Kshs 522,240**
- Less 20% contribution**
- Grant Total Kshs 417,792.**

The appellant shall have half costs of this appeal and likewise in the lower court.

Delivered this 15th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Teti for Batilol for Respondent

No appearance for the Applicant

Kirong – Court Assistant