



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 46 OF 2014

Grace Wairimu Kinyugo

(as the legal Representative of the Estate

of Francis Ruengo Kinyugo.....Appellant

Versus

Keroche Breweries Limited.....Respondent

(An appeal from the Judgment of Hon. S. Mwayuli, R.M. delivered on 2. 7. 2014 in Karatina C.M.C.C. No. 29 of 2013)

JUDGMENT

This appeal raises only one ground, namely, *that the trial Magistrate erred in law and in fact in assessing damages for loss of dependency under the provisions of the Fatal Accidents Act and made an award that was manifestly and excessively low.* It is acknowledged that the Respondent fully settled the decretal sum, but the appellant dissatisfied with the said award instituted this appeal.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda***)

The appellants' counsel in their submissions argued that it was wrong for the court to subject dependency to **1/3** ratio, thereby heavily reducing the support given to the appellant by the deceased by a total of **Ksh. 2,666/=** per month from the claimed sum of **Ksh. 4,000/=** and that the income of **Ksh. 4,000/=** awarded by the court was low considering the **Ksh. 6,000/=** minimum government wage. Counsel also submitted that the deceased died at 33 years and that the multiplier of **10 years** adopted by the court was low and proposed a multiplier of 25 years.

Counsel for the Respondents in their submissions urged the court to dismiss the appeal arguing that the court can only disturb a lower court's award if it's totally unjustifiable.

In my view, the only issue that falls for determination in this appeal is whether or not there is any reason to interfere with the learned magistrates' award of damages under the Fatal Accidents Act.

The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli* had this to say:

"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters; or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore, as was held in the above cited case, and indeed in numerous authorities in this country, an appellate court will only interfere with the award on general damages on the above cited grounds.

In *Kivati -vs- Coastal Bottlers Ltd* the Court of Appeal had the following to say:-

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

In *Ken Odoni & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocate* stated as follows:-

"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

The Court of appeal proceeded to observe that this is the general principle to be found in *Rook v Rairrie* . This principle was adopted with approval by the Court of Appeal in *Butt v Khan* where it was held per **Law, JA:-**

"... An appellate court will not disturb an award of damages unless it is so 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..."

Turning to the facts of this case the learned magistrate awarded damages under the following heads, **(i)** Pain and suffering---Ksh. 10,000/=. This amount is not appealed against. **(ii)** Loss of life expectation----Ksh. 100,000/=. Also this award is not appealed against, **(iii)** Special damages-----Ksh. 44,500/-. This amount is not contested, and **(iv)** Loss of dependency---Ksh. 4,000/= x 12 x 10 x 1/3= Ksh. 160,000/=. This is the award the subject of this appeal.

In the plaint the appellant pleaded that the deceased was earning Ksh. 6,000/=. In her evidence in court appearing at page 88 of the record the appellant did not give any evidence on the deceased's income at all. In fact her evidence was that she did not know his salary even though he was working as a messenger. No letter or document was produced from her employer to support that he was indeed employed and if so, the income. Clearly, there was no proof of income. The possibility that he deceased may have been earning less than the minimum government cannot be ruled out given the kind of work he was doing.

The most important group of torts in practice is that dealing with personal injuries, especially the tort of 'Negligence.' In the Ghanaian case of *Mensah v. Amakom Sawmi* Apaloo, J. (as he then was did express

how difficult the subject of assessment of damages was and turned to the judgment of **Lord Wright** in *Davies v. Powell Duffryn Associated Collieries Limited*, for support. This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. **Lord Wright** said:-

“There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a ‘datum’ or ‘basic’ figure which will generally be turned into a lump sum by taking a certain ‘number of years purchase’. That sum, however, has to be tasked down by having due regard to the uncertainties,.....””

Some of the uncertainties or questions asked are:-

- i. How long would the deceased have continued to live if he had not met this particular accident?
- ii. How much working life did he have? This second question brings into focus the deceased’s state of health and age.
- iii. Some of the uncertainties taken into account in rolling down the amount are:- the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time.

Lord Wrights rule, which was applied by other decided cases, was admirably summarized in

Charlesworth on Negligence as follows:-

“Method of calculating damages: *When the income of the deceased is derived from his own earnings, ‘it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.’ The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the ‘lump sum’ or the ‘basic figure’) by multiplying it by a figure representing the proper ‘number of years’ purchase arrived at having regard to the deceased’s expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependants and the probable duration of the continuance of the deceased’s assistance to the dependants during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependants in consequence of the death.” (Emphasis added)*

I find wisdom in the words of **Holroyd Pearce, L.J.** who said:- "since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury." He was however, of the view that arithmetical calculations do not provide a substitute for common sense.

As to whether the court erred in arriving at a dependency ratio of 1/3, I take the view that dependency is fact which has to be established in evidence.

In *Beatrice Wangui Thairu vs. Hon. Ezekiel Barng'etuny & Another* which was relied in *Rev. Fr. Leonard O. Ekisa & Another vs. Major Birgen*, **Ringera J** said *inter alia*:-

“... there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case..”

Guided by the above quoted decision, I find no basis to fault the ratio of 1/3 adopted by the magistrate which is commonly adopted where the deceased was unmarried as in the present case.

On the issue of the correct multiplier, I find guidance in the case of *In Hannah Wangaturi Moche & Another vs. Nelson Muya* where it was held as follows:-

“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum

Applying the above approach, considering the age of the deceased at the time of his death, the possible balance of earning life of the deceased and the other factors stated in the above decisions, I conclude that the multiplier of 10 years adopted by the magistrate was not reasonable and that the same is on the low side, hence the award on this head was inordinately low.

The deceased is said to have been aged 33 years at the time of his death. Taking into account the uncertainties of life as enumerated in the above authorities, I conclude that a multiplier of 22 years would have been reasonable. As for the monthly income, considering the appellants evidence that the deceased was messenger and that the firm, company or employer was not disclosed, I take the view that the sum of Ksh. 4,000/= applied by the court was reasonable.

Thus, I calculate damages for loss of dependency as follows:- **Ksh. 4,000/= x 12 x 22 x 1/3= Ksh. 352,000/= less Ksh. 160,000/= already paid, balance Ksh. 192,000/=**. I vary the award by the lower court on the above head as herein above stated and enter judgement in favour of the appellant accordingly.

In conclusion, I allow the appeal and order that the Respondents do pay the appellant the balance of **Ksh. 192,000/=** as herein above stated plus interests from the date of filing the appeal. Since the Respondents had already settled the decretal sum as awarded by the lower court, I find it unfair to penalize them to pay costs of this appeal. In exercise of my discretion I direct that each party bears its costs of this appeal.

The upshot is that this appeal is allowed as herein above stated.

Orders accordingly

Dated at **Nyeri** this 7th day of March 2016

John M. Mativo

Judge