



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 75 OF 2015

NATHAN SOIRE t/a GETEMBE PRIME DISTRIBUTORS.....APPELLANT

VERSUS

LUCIA NYOERA NYABAYO & PETER OORO ONGERI

(Suing as legal representatives of

JACOB NYABAYO ONGERI (Deceased).....RESPONDENTS

(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 266 of 2012 (Hon. J.M. Njoroge CM)

JUDGMENT

1. This appeal arises from the decision of the Chief Magistrate in Kisii **CMCC No. 266 of 2012**, in which the appellant, **Nathan Soire t/a Getembe Prime Distributors**, and another were sued by the respondents, **Lucia Nyoero Nyabayo and Peter Ooro Ongeri**, being personal representatives of the late Jacob Nyabayo Ongeri, for special and general damages arising from a road traffic accident which occurred along the Kisii – Kisumu road on the 9th February 2012.
2. It was pleaded by the respondents that on the material date, the deceased was walking along the verge of the Kisii –Kisumu road at Daraja Mbili Market area or thereabout, when he was knocked down by the appellant’s motor vehicle Reg No. **KBH 283V**, which had in turn been hit by a vehicle Reg No. **KAL 487M**, belonging to Kisii Bottlers Ltd, the first defendant in this case.
3. The respondents contended that both vehicles were at the material time being driven in a reckless and negligent manner. They blamed the drivers of both vehicles for the accident and prayed for damages against the appellant and Kisii Bottlers Ltd under both the Law Reform Act and the Fatal Accidents Act. They also prayed for special damages as well as costs of the suit plus interest.
4. The appellant filed his statement of defence in which he denied all the allegations of negligence made against himself and contended that if indeed an accident occurred, then it was as a result of the negligence, carelessness and/or recklessness of the driver of the motor vehicle Reg No. KAL 487M. He prayed for the dismissal with costs of the appellant’s case against him.
5. Judgment on liability was by consent entered against the appellant at 30% and his co-defendant at 60% with the respondent bearing 10% liability.

The matter proceeded to trial on quantum of damages payable to the respondents and after hearing and considering the respondents’ evidence, the trial court entered final judgment in their favour in the total

sum of Ksh. 1,940,000/= of which Ksh. 1,164,000/= was payable by the first defendant (Kisii Bottlers Ltd) and Ksh. 582,000/= was payable by the second defendant/appellant.

6. The total amount was made up of Ksh. 10,000/= for pain and suffering, Ksh. 100,000/= for loss of life expectation, Ksh. 1,779,200/= for loss of dependency and Ksh. 50,800/= being special damages.

Being aggrieved by the award, the appellant lodged this appeal on the basis of the grounds contained in the memorandum of appeal dated 15th June 2015.

7. The appeal was argued by way of written submissions and in that regard both parties filed their respective submissions through the firm of **O.M Otieno & Co. Advocates**, for the appellant and the firm of **M/s Khan & Associates**, for the respondents.

This is a first appeal, the duty of this court is therefore to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

8. The question of liability having been settled by consent of all the parties, this appeal is essentially on assessment of damages.

The appellant contends that the award of damages by the trial court was excessive and that the multiplicand of Ksh. 27,800/= adopted by the court had not been proved. He therefore invites this court to revisit the issue of assessment of damages and vary, review and/or reduce the award to a reasonable amount commensurate to the circumstances of the case.

9. The principles to be observed by an appellate court in deciding whether or not to interfere with the quantum of damages awarded by a trial court were clearly set out by the Court of Appeal in **Kenfro Africa Ltd t/a Meru Express Service & Another Vs. A.M Lubia & Another (1982 – 1988)1 KAR 727**, where it was stated that:-

“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 either 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 damage”.

10. In this appeal, the appellant raises issues with the general damages awarded to the respondents by the trial court and in particular for loss of dependency where a multiplicand of Ksh. 27,800/= was adopted.

In his submissions, the appellant stated that apart from a letter from Entanke Youth Polytechnic where the deceased was said to be a lecturer, there was no convincing evidence such as a payslip or contract of employment showing that the deceased earned a salary of Ksh. 27,800/= per month.

11. Therefore, the trial court ought to have adopted a multiplicand of Ksh. 15,000/= based on the current Regulation of Wages (general) Amendment Order, 2012.

The appellant proposed an award of Ksh. 360,000/= for loss of dependency based on a multiplicand of Ksh. 15,000/=, a multiplier of 3 years and a dependency ratio of 2/3rds.

12. The appellant also submitted that the award of Ksh. 100,000/= for loss of expectation of life and Ksh. 10,000/= for pain and suffering ought to have been discounted by the trial court since the benefits were to go to the same dependents.

In support of his submissions, the appellant relied on the decisions in **Rev. Fr. Leonard Ekisa & Another Vs. Major Birgen (2005)e KLR, Comply Industries Ltd & Another Vs. Martha Ngina Muthini (2014)e KLR** and **William Momanyi Vs. Zipporah Kwamboka Abunda Kisii HCCA No. 93**

of 2004.

13. The respondents on their part submitted that the award of Ksh. 10,000/= for pain and suffering was a conventional amount and that the award of Ksh. 100,000/= for loss of life expectation was conceded by the appellant.

The respondents therefore urged this court to uphold the amounts and relied on the decision in **Philip Musyoka Muma Vs. Veronica Mbula Mutiso 2013e KLR.**

14. With regard to loss of dependency, the respondents submitted the multiplier adopted by the trial court was proper given that there was no evidence to show that the deceased suffered ill-health or was exposed to greater risk in his vocation or career.

In that regard, the respondents relied on the decisions in **Philip Musyoka Muma Vs. Veronica Mbula Mutiso (Supra)** and **Elizabeth Mary Adembesa Vs. Shadrack Mwoki Marua & Nixon Oywa (1994)e KLR.**

15. It was further submitted by the respondents that there was sufficient evidence adduced to prove the deceased's earning at Ksh. 27,800/= per month and this was not rebutted by the appellant.

In that regard, reliance was placed on the decisions in **Julius Orita Ayiecha Vs. Consolata Anyango Ondijo (2015)e KLR**, **Daniel Kimathi Kaburu Vs. Gerald M. Murungi Meru HCCA No. 309 of 2013**, **Esther Nyambura Vs. Carness Rashid Chepaurenge & Another (2008)e KLR** and **Jacob Ayugo Maruja & Another Vs. Simeon Obayo (2005)e KLR.**

16. The respondents urged this court to dismiss this appeal for want of merit on all its grounds.

Considering the said grounds of appeal in the light of the rival submissions by the parties and with regard to the awards made by the trial court for pain and suffering (Ksh. 10,000/=) and loss of life expectation (Ksh.100,000/=), it is notable that these were made under the Law Reform Act and therefore for the sole benefit of the estate of the deceased.

17. Such awards are based on the presumption that a person has a legal right that his life shall not be abridged by the negligence of another. This normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given (see, **Kemp Vs. Kemp "Quantum of Damages" Vol 1.**)

The estate of the deceased would be the beneficiary of such awards which cannot be discounted on the basis that it would amount to double compensation considering that the beneficiaries would be the same ones to benefit under the Fatal Accidents Act.

18. Double compensation would not arise since damages under the Law Reform Act and Fatal Accidents Act are distinct and separate and in some instances the beneficiaries may not be the same persons.

In any event, there was no evidence that damages awarded under the Law Reform Act and the Fatal Accidents Act would solely go to the respondents (see, **Mahmud Salim Omar Vs. M.A Bayusuf MSA Civil Appeal No. 48 of 2006 (C/A).**)

19. In this case, evidence was led by the respondents through, **Peter Oroo Ongeru (PW 1)** and **Agnes Nyanchama Nyamumbo (PW 2)**, indicating that the deceased was aged fifty-six (56) years at the time of his death and a lecturer at a Youth Polytechnic where he earned a monthly salary of Ksh. 27,800/=.

20. A letter from the said Polytechnic (P.Ex 4) confirmed that the deceased was indeed an employee of Entanke Youth Polytechnic and was earning a monthly salary of Ksh. 27,800/=.

The awards made herein for pain and suffering and loss of life expectation under the Law Reform Act,

were reasonable and adequate such that this court is compelled to refrain from interfering with them. It does not escape this court's observation that at the trial, the appellant in fact also proposed the sum of Ksh. 100,000/= for loss of expectation of life and Ksh. 10,000/= for pain and suffering.

21. With regard to loss of dependency, the appellant proposed at the trial and in this appeal a multiplicand of Ksh. 15,000/= being the monthly salary of the deceased and a multiplier of three (3) years.

The proposal of Ksh. 15,000/= made at the trial was not based on any scheme of service or regulation of wages. In this appeal, the appellant introduced a new factor i.e the Regulation of Wages Order, 2012, to justify the proposal of Ksh. 15,000/=. He does not dispute that the deceased was indeed employed by the Youth Polytechnic but contends that his alleged monthly salary of Ksh. 27,800/= was not proved.

22. The standard of proof in a civil case is on a balance of probabilities and since there was no other evidence to counter the respondents' document (P.Ex 4) showing that the deceased earned a monthly salary of Ksh. 27,800/=:, there was no good reason for the trial court not to accept a multiplicand of that amount in assessing damages under the Fatal Accidents Act.

Although a salary slip would have been the best evidence in the circumstances, the reliance by the trial court on the letter (P.Ex 4) was good enough in proving the deceased's monthly salary on a balance of probabilities.

23. More so, considering that the appellant did not substantially or at all dispute that the deceased earned a monthly salary of Ksh. 27,800/= as an employee of the Youth Polytechnic.

As for the multiplier of eight (8) years adopted by the trial court, it was proper and reasonable considering the age of the deceased and that he lived and was expected to live a healthy life for a considerable period of time but for the negligence of the appellant which cut his life short.

24. The proposal by the appellant that the multiplier be reduced to three (3) years had no basis and was not supported by any evidence.

It is therefore the opinion of this court that the trial court's assessment of damages for loss of dependency was proper in as much as it was guided by the applicable principles.

25. In addition to the damages mentioned hereinabove, the respondents were also entitled to the claimed special damages in the sum of Ksh. 50,800/= which were established by necessary documentary evidence without dispute.

In sum, this appeal is devoid of merit and is hereby dismissed in its entirety with costs to the respondents.

[Delivered and signed this 15th day of November 2016].

J.R. KARANJAH

JUDGE

In the presence of

Njoroge CC

M/s Ndukekena for Appellant

Court: Stay of execution granted for a period of 30 days as applied by appellant.

J.R. Karanjah, Judge