



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 57 OF 2014

BETWEEN

PAUL MOMANYI SOIRE NATHAN..... APPELLANT

AND

CAROLINE MORAA AKUMBA & GEORGE AMIN OMAYO

***(Suing as the legal representative of the estate of FESTUS KUMBA
OMAYO.....RESPONDENT***

***(Being appeal from the judgment and decree of Hon. A. Onginjo C.M. dated 15th April, 2014 in the
original Kisii CMCC No. 126 of 2012.)***

JUDGMENT

1. By a plaint dated 16th March 2013 the respondent sued the appellant claiming special and general damages arising out of a road traffic accident on 21/10/2011 along Kisii-Nyankongo road involving the 1st respondent's husband FESTUS KUMBA OMAYO (herein referred to as the deceased) and motor vehicle registration number KAU 278Y.

2. It was pleaded that the said accident was caused by the negligence on the part of the appellant and or his driver, agent, servant, employee or assignee particulars thereby were pleaded in paragraph 4(a) – (I) thereof. It was further pleaded pursuant to the (Fatal Accident Act and Law Reform Miscellaneous Provision) Act that at the time of his death the deceased was aged 29 years and was a stone crasher earning approximately Kshs.500 per day with which he supported his family the support of which the same has lost by his death.

3. The respondent further pleaded that by reason of the deceaseds death his estate suffered special damages as follows:-

- | | |
|--|----------|
| (a) police abstract | 200/= |
| (b) Death certificate | 100/= |
| (c) Funeral coffin, clothings, transport, postmortem mortuary and related expenses | 100,00/= |
| (d) Legal fee incurred paid towards processing letters of administration | 20,000/= |
| (e) Cost of search | 500/= |

4. By a statement of defence dated 30/5/2012 the appellant denied being the registered proprietor of motor vehicle registration number KAU 278Y denied the occurrence of the alleged road traffic accident on 21/10/2011 and on a without prejudice basis attributed the cause of the said accident solely to the negligence, carelessness or recklessness on the part of the deceased part particulars thereof were pleaded in paragraph 9 thereof to wit.

(i) Walking on a busy highway while extremely drunk with changaa and/or under the stupor and/or influence of alcohol.

(ii) Walking on a busy highway while carrying a jericane of illicit brew and sipping thereby impairing his mental and judgmental faculty.

(iii) Abruptly crossing a busy road without abiding by the highway code and/or keeping any look out.

(iv) Abruptly emerging from behind a stationary vehicle into a lane of the suit vehicle thus inevitably occasioning the accident.

(v) Turning a busy highway into a merry making and alcohol drinking place thereby occasioning the accident among others.

5. On 12/11/2013 the parties here entered a consent judgment on liability at 30%:70% against the appellant and the matter proceeded for assessment of damages wherein the respondent case was that the deceased as per the death certificate was 28 years old at the time of his death and that before filing suit pw1 Caroline Moraa had obtained grant of letters of administration in Kisii High court succession cause No. 719 of 2011. The said accident was confirmed by a police abstract.

6. It was Pw1's evidence that the deceased used to earn Kshs.500/= per day of which he used to give her Kshs.7000/= for the upkeep as a result of the accident the deceased was admitted to Hema Hospital from where he died. Under cross examination the respondent stated that she did not have receipts in support of the funeral expenses.

7. In assessing damages herein the trial court had this to say:

“On the issue of damages for loss of dependency the deceased was said to have been selling ballast and earning 500/= per day but this being casual work there could have been no documentary proof of the same and as such the court will go by the basic minimum wage as regulated under legal notice No. 12 of 2001 where stone cutter is paid 4156 per month in all the areas of the county. The deceased having been 29 years I now find that a multiplier of 25 years would be reasonable considering all the uncertainties of life.”

8. Being dissatisfied with the said judgment on quantum the appellant filed the appeal and raised the following grounds:-

1. That learned trial magistrate erred in Law and in fact when the same opted to apply a Multiplicand of Kshs.4,156/-, whereas the respondents failed to put before court any material from which the court could derive a deduction that the deceased was engaged in any meaningful employment.

2. That the learned trial magistrate erred in law and in principle, by applying erroneous principle in computation of damages payable thus arriving at erroneous and grossly excessive estimates of General damages payable.

3. The learned Trial Magistrate erred in Law and in principle, when the same failed to discount the award of Kshs.100,000/=, made under the heading of loss of expectation of

life, from the total and cumulative award, thus making grave and prejudicial omission.

4. That the learned trial magistrate erred in law and fact, when the same awarded special damages which were never proved or specifically pleaded.

5. The learned trial magistrate erred in law and fact when she failed to subject the costs payable to percentage of contribution borne by the respondents.

6. That the learned trial magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching erroneous decision.

9. Direction were given that this appeal be determined by way of written submission which have now been filed.

APPELLANTS SUBMISSION

It was submitted that the appeal was on loss of dependency and special damages. It was the appellants submission that there was no evidence to support the respondents allegations that the deceased was earning Kshs.500 per and that the same was giving the respondent Kshs.700/= per month.

10. It was submitted that the respondent ought to had tendered sufficient evidence to prove that the deceased was earning an income and that the respondent and other were depending on his income and in the absence of such evidence the claim for loss of dependency should have been dismissed. The appellant submitted the case of **James Mukolo Elisha & Another V Thomas Martin Kibisu Court of Appeal at Nairobi Civil Appeal No. 31 of 2006.**

11. It was submitted by the appellant that the plaintiff had testified that the deceased was earning Kshs.500 per day which then culminates into Kshs.15,000/= per month and since the deceased was giving her Kshs.7000/= per month for upkeep the court should have used a ratio of 7/15 and not 2/3. It was therefore submitted that the trial court proceeded on wrong principles and or misapprehended evidence.

12. It was further submitted that a multiplier of 25 years adopted by the court was too high and therefore a multiplier of 20 years was proposed as being reasonable. It was therefore proposed that – multiplicand of Kshs.3000/=-:

$$3000 \times 20 \times 12 \times 7/15 = 336,000/=$$

13. On special damages it was submitted that only Kshs.39,000/= was proved and should have been awarded.

RESPONDENT'S SUBMISSION

14. It was submitted that special damages were specifically pleaded in the plaint and that an award of Kshs.50,000/= under special damages for funeral expenses was not inordinately high. In support of this award reliance was placed on the case of **PREMIER DIARY LTD V AMARJIT SINGH SAGOO & ANOTHER COURT OF APPEAL NO. 312 OF 2009** at Kisumu where the court of appeal said that:-

“We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when their primary concern is that a close relative has died..”

15. On the issue of computation of damages it was submitted that a multiplicand of 25 years adopted by the court was supported by the following authorities:

(a) KISII HCCC No. 142 of 2011 SAMUEL ONDIEKI ATHIANY V DANIEL ODERO DIANGA & ANOTHER.

(b) DORKA KWAMBOKA V GEORGE ONDIEKI & ANOTHER KISII HCCC NO. 79 OF 2008.

(d) MILDRED AORI V HUSSEIN DAIRY LTD KISII

HCCC NO. 24 OF 2009.

16. There are only two issues for determination in this appeal:

(a) whether the respondent proved loss of dependency and if so what should have been a reasonable award.

(b) Whether the trial court was right in awarding a figure of Kshs.50,000/= in respect funeral

expenses.

17. Justice M.J. Anyara Emukule when confronted with this issues in the case of **ALICE O. ALUKWE V AKAMBA PUBLIC ROAD SERVICES LTD** and 3 others **HIGH COURT OF KENYA AT NAKURU CIVIL SUIT NO. 26 OF 2005** had these to say:

18.

“ special damages (funeral expenses)

*25 However she only produced the receipt for the police abstract and the advertisement charges. There were no receipts produced to prove the claim for funeral expenses. However the court of appeal in the case of **JACOB AYIGA MARUJA & ANOTHER V SIMEON OBAYO** (2005) eKLR awarded the plaintiff Kshs.60,000/= for funeral expenses and held thus.”*

“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs.60,000 must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.”

18. In the case appealed from the respondents evidence was that they incurred funeral expenses of Kshs. 100,000/= on the mourners who came to condole with them of this amount of money she paid a half. There was no evidence tendered before the trial court to confirm that the deceased economic status was below an award of Kshs.50,000/= as being reasonable funeral expenses as the appellant did not challenge the respondents allegation of having spent Kshs.100,000/=.

19. Taking into account that Justice Emukule in the case of ALITRO, ALUKWE supra awarded Kshs. 30,000/= in respect of funeral expenses for a 17 year old who was unmarried at the time of her death, I am of this considered opinion and find that the trial courts award of Kshs.5,000/= was reasonable since the deceased was married and would decline to interfere with the same.

20. In respect of loss of dependency in the case of **SILAS MUGENDI NGURU v NAIROBI WOMENS HOSPITAL NAIROBI HIGH COURT CIVIL CASE NO. 34 OF 2012** Justice H.P.G. Waweru adopted a multiplicand of 25 years in respect of a 29 year old at the time of her death this multiplicand is also confirmed by the supporting authorities submitted by the respondent being the case of Samuel Ondieki Athiany (supra) and Dorcas Kwamboka supra both in which the court applied a multiplier of 25 years in respect of similar ages. I am therefore not persuaded that the multiplier of 25 years as adopted by the court was too high as submitted by the plaintiff.

21. Since the respondent did not submit any document in support of the deceased earnings and in support of an alleged upkeep of Kshs.7000 and taking into account the fact that the appellant did not dispute or offer any evidence to challenge the respondents evidence that the deceased was a stone cutter and this being a civil matter where the burden of proof is only on a balance of probably. I find no fault in the trial courts use the basic minimum wages in assessing loss of dependency.

22. Since there is no dispute that the deceased was married with children who depended upon him. I find no fault in the trial courts use of conventional rule that 2/3 would be available to go towards the dependants.

23. This being a civil matter the respondents was only required to prove her case on a balance of probability and upon reevaluation of the evidence tendered I find that the same succeeded in proving her case thereby distinguishing the holding in **JAMES MUKULO ELISHA** (Supra).

24. In the final analysis I find no merit on the appeal herein and confirm the judgment of the trial court with costs to the respondents as follows:-

1. General damages for loss of dependency	831,200
2. Loss of expectation of life	100,000
3. Pain and suffering	10,000
4. Funeral expenses	50,000
5. Special damages	<u>39,000</u>
TOTAL	1,030,200
6. Less award under law reform	<u>110,000</u>
	<u>920,200</u>
7. Less 30% contribution	<u>276,060</u>
	<u>644,140</u>

Delivered, signed and dated at Kisii this 2nd day of July 2015.

J. WAKIAGA

JUDGE

In the presence of:

Mr. Otieno for appellant.

Mr. Ogweni for respondent.