



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL NO.8 OF 2014

(Appeal from the Judgment in Malindi CM CC No.204 of 2010 by Hon. L. Gicheha)

SIYARAM ENTERPRISES)

JACKSON MUIRURI).....APPELLANTS

VRS

SAMUEL NYACHANI NYACHANI

Suing on behalf of the Estate of:

VINCENT NGWACHO NYACHANI.....RESPONDENT

JUDGMENT

The respondent was awarded damages by the Malindi Chief Magistrate's Court in Civil Suit number 204 of 2010. The respondent filed the suit in his capacity as the administrator of the estate of the late Vincent Ngwacho Nyachani who died of a road traffic accident on 15th May 2009. Being dissatisfied with the amount of awarded damages, the appellants preferred this appeal on the following grounds:

1. The amount awarded for loss of dependency was excessive as there was no proof of the deceased's earnings or employment.
2. The trial court erred in law by holding that the deceased's older siblings were dependents.
3. The trial court erred by applying a multiplier of 16 years.

Parties agreed to determine the appeal by way of written submissions. I have carefully read the submissions by counsel for both parties. The main issue being raised by the appellant is that the award on loss of dependency is excessive. This argument is based on the contention that the deceased was not in formal employment and no evidence was tendered to prove that he was a taxi driver. No payslips were tendered or evidence from a fellow taxi driver adduced. It is also submitted that under section 4 of the Fatal Accidents Act, brothers do not qualify as dependants.

On his part, counsel for the respondent is in agreement with the findings of the trial court. It is contended that the deceased contributed ksh.6,000/- monthly to his dependents. The deceased had moved from Kisii to Malindi to look for greener pastures. Being a taxi driver, he could not have been expected to produce payslips.

The record of the trial court shows that on 2/7/2013 parties recorded a consent on liability. Liability was apportioned at 70% on the part of the appellant and 30% on the part of the respondent. Only one witness testified. The respondent, Samuel Nyanchani Nyachweya informed the court the deceased was his child. He died on 15/5/2013 as a result of a road tragic accident. The respondent's evidence was that the deceased used to support him and his two other brothers. He was a taxi driver and helped his father to pay school fees. The family suffered and the deceased's mother also passed on. The deceased was 29 years old. The deceased was riding on a motor cycle which he had bought for ksh.90,000/- when the accident occurred.

The record shows that the case proceeded ex-parte. However, the appellant filed its written submissions before the judgment was delivered. It is clear from the submissions filed by the appellant in relation to the appeal that the main issue is the award of ksh.1,152,000/- for loss of dependency. There is no mention of the other damages that were awarded by the trial court.

The trial magistrate noted that there was no evidence that the deceased used to earn ksh.15,000/- per month as a taxi driver. The court further noted that being a young man, the deceased was earning his living. The court adopted a monthly salary of ksh.9,000/- and took that amount to be the minimum Government wage. The court also used a multiplier of 16 years to compute damages for loss of dependency.

The appellant contends that the only dependant was the respondent. It is further submitted that the respondent has other children who could be providing for him. The respondent himself is a farmer and the dependency was quite low. The court will have to consider whether the deceased had any dependant. It is true that section 4 of the Fatal Accident Act does not include brothers as dependants. The evidence does not show that there were younger brothers whom the deceased had taken as his own children. The contention that the deceased used to help the respondent in paying school fees is not backed by any other evidence. It is not indicated which brother was still in school and the name of the school was not given. However, the appellant admits that the respondent was a dependant. This being the case, I do find that the award of damages under the Fatal Accidents Act by the trial court was lawful. The number of dependents does not matter. The deceased's father is a dependant and was entitled to damages for loss of dependency.

The next issue for determination is whether damages awarded for loss of dependency is excessive. For this court to interfere with the award, it must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied. This was the holding in **Butt v Khan [1981] KLR 349**. Similarly, in the Case of **Mbogo & Another v Shah [1968] E.A 93**, the court held as follows:

“...it is well settled that this court will not interfere with the exercise of its discretion by an interim court. Unless it is satisfied that its decision is clearly wrong, because it had misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

The appellant is contesting the choice of the multiplier of 16 years. The deceased was 29 years old. The retirement age is 60 years. He was not in formal employment. The choice of a multiplier is part of the discretion available to trial courts whenever assessing damages in fatal accident cases. In the Case of **Board of Governors of Kangubiri Girls High School & Ano v Jane Wanjiku Muriithi & Ano. [2014] eKLR**, the Court of Appeal was called upon to interfere with a similar award where the deceased was 31 years and a multiplier of 25 years had been adopted. The court stated the following:

“We have examined case law where the deceased is 31 years of age. In Rachael Ivasha Igunza v Nyenjeri Kamau HCCC No.340 of 1993, the deceased was 33 years old and a multiplier of 22 was used. In Mary Awino Adunga v John K. Wambua & Ano. HCCC No.482 of 1994, the deceased was 32 years and a multiplier of 23 was adopted. In

Corneha Eliane Wamba v Shreeji enterprises Ltd & Others (supra) the deceased was 31 years of age at the time of his death, a multiplier of 25 years is not only appropriate but also fair to both sides.

Since the deceased in the current case was 29 years old, a multiplier of 16 years old is quite fair and I see no good reason to interfere with the finding of the trial court.

Before the trial court, the appellant had proposed an award of ksh.480,000/- as damages for loss of dependency. This was based on a monthly salary of ksh.6,000/- and a multiplier of 10 years. The trial court adopted a monthly wage of ksh.9,000/-. I do find that being a young man, he was able to raise that amount per month.

There is the issue of dependency. The deceased had only one dependant, the respondent. Although it has always been assumed that the deceased persons give two thirds of their income to their dependants, this is not based on any statutory provision. It would be unreasonable to conclude that out of the ksh.9,000/- the deceased would have earned in a month, ksh.6,000/- would have been given to the respondent while the deceased utilised only ksh.3,000/-. The opposite ought to be the case. Had the deceased had a family of his own, then the usual presumption of two third rate of dependency could be considered to be fair.

In the unreported Case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another (Nairobi HCCC No.1638 of 1988)**, Justice Ringera as he then was stated the following:

“I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. When a trial court adopts two thirds of the income to value dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law.... they are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellant bench in Bor v Onduu [1982 – 1992] 2 KAR, 288”.

Given the fact that there is only one dependant, I do find that one third dependency rate is sufficient.

With regard to the issue of proof of income, a majority of Kenyans are not in formal employment. To have expected the respondent to produce receipts or payslips to prove income would have been unreasonable. In the Case of **Jacob Ayiga Maruja & Ano. V Simeane Obayo, Civil Appeal no.107 of 2002 [2005] eKLR**, the Court of Appeal held 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 records ad 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.”

In the end, I do find that the appeal partly succeeds: the award on loss of dependency is set aside and replaced with the following award:

Loss of dependency-ksh.9000x12x16x1/3 =ksh.576,000/-

The rest of the findings of the trial court shall remain uncharged. The respondent is awarded damages as follows:

Loss of dependency - Ksh.576,000/-

Pain and suffering - 10,000/-

Loss of expectation -100,000/-

Special damages - 130,000/-

TOTAL -KSH.816,700/-

The above amount shall be subjected to 30% contribution leaving a balance of ksh.571,000/-. The respondent shall have costs as awarded by the trial court. Each party shall meet their own costs of the appeal.

Dated, signed and delivered at Malindi this 15th day of October, 2015.

SAID J. CHITEMBWE

JUDGE