



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 193 OF 2010

JOSEPH IRUNGU GACIRA.....APPELLANT

VERSUS

GEOFFREY NDIRANGU MUNENE.....RESPONDENT

(arising out of the judgment of Hon.J. Kiarie Senior Principal Magistrate Nyeri in Civil suit No. 616 of 2009)

JUDGMENT

1. By a plaint dated 30th September 2009 the Respondent sued the Appellant in respect of a road traffic accident on 31st May 2009 involving BEATRICE WAIRIMU NDIANGUI deceased who was aged 50 years at the time of the accident and who was described as a business lady and a farmer making a profit of about Ksh. 10,000/- per month.
2. The deceased beneficiaries were named in paragraph 4 of the plaints as follows:

- | | | |
|------------------------------------|---|---------------------------|
| <i>a. Geoffrey Ndirangu Munene</i> | - | <i>husband</i> |
| <i>b. Caroline Wambui Ndiangu</i> | - | <i>daughter 28 years</i> |
| <i>c. June Wanjiru Ndiangu</i> | - | <i>daughter 26 years</i> |
| <i>d. Benjamin Munene Ndiangu</i> | - | <i>son 24 years</i> |
| <i>e. Rachael Njeri Ndiangu</i> | - | <i>daughter 23 years.</i> |

3. The Appellant filed defence dated 15th December 2009 in which he denied that the deceased was a passenger in motor registration KAX 897Y and denied ownership of the same together with negligence attributed to him by the Plaintiff/Respondent
4. The matter proceeded for hearing before Kiarie J then SPM after liability had been agreed upon by consent at 85%, 15% against the Appellant and the trial magistrate entered judgment for the Respondent as follows:

- | | | |
|---------------------------------------|---|----------------------|
| 1. Pain and suffering | - | Sh. 10,000/- |
| 2. Loss of expectation of life | - | Sh. 100,000/- |

3. Loss of dependency - the trial magistrate awarded Kshs. 840,000/- as follows - multiplier 15 years multiplied 7000.

5. Being aggrieved by the said award the Appellant filed this appeal and raised the following grounds.

1. That the learned magistrate erred in law and fact by recognizing and applying an amount of Ksh. 7000 as monthly income of the deceased which amount is unsupported, manifestly and unrealistic.

2. That the learned magistrate erred in law and fact by applying a too high a multiplier which is disproportionate to the then age of the deceased.

3. That the learned magistrate erred in law and fact by failing to address his mind to the authorities cited by the Appellant.

4. That the learned magistrate erred in law and fact in assessing General damages which were manifestly high an disproportionate to the loss suffered by the Respondent.

5. That the learned magistrate erred in law and fact by failing to consider the appellant's counsel's submissions.

6. Directions were given that this appeal be heard by way of written submissions which have now been filed by both parties.

SUBMISSIONS.

7. On behalf of the Appellant it was submitted that in calculating loss of dependency the trial magistrate applied an income of Ksh. 7000/- which income was too high and unsupported by documentary evidence and that the learned magistrate applied a principle not known to law called "setting in the middle". It was submitted that the proposed 30 Ksh. 3000/ was supported by the case of DORCAS AMUNGA V JOHALI BAYA & ANOTHER

8. It was submitted that in arriving at a multiplier of 15 years the trial magistrate did not give reasons for the same and that the court should rely upon the decision in JANE KAMAU & OTHERS V ALICE MUGAMANGI and JOYCE KARIUKI VS EASTERN BUS SERVICE in support of a proposal for 5 years.

9. It was further submitted that the trial magistrate did not take into account the submissions filed by the Appellant and the authorities submitted in support thereof.

10. On behalf of the Respondent it was submitted that the appeal lacks merit and that the trial court did not make any error of fact or law. It was submitted that the Respondent had testified that the deceased had a monthly income of Ksh. 10,000/- and that since there was no records to support this the court was right in arriving at Kshs. 7000/- and in support thereof referred to the case of JACOB AYIGA MARAJA & FRANCIS KARANI vs SIMSON OBAYO C.A NO. 167 OF 2002 KISUMU.

11. On the multiplier of 15 years it was submitted the principles upon which the appellate court can interfere with the award by the trial court are well settled and in support thereof submitted the case of KEMFRO EXPRESS LTD t/a MERU EXPRESS SERVICES GATHOGO KARIMI v AM. LUBI & ANOTHER (1982-88)IKLR727 and that the trial court considered all the authorities and submissions by the parties. He therefore urges the court to dismiss the appeal.

ISSUES

12. From the pleadings hearing and the record of appeal and submission by counsels I have identified the following issues for determination.

1. Whether the trial court erred in law and fact in reaching the award herein.

2. Whether this court should interfere with the award made.

13. This being a first appeal the court is obliged to reassess the evidence tendered before the trial court so as to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as did the trial court.
14. At the trial before the lower court it is only the Respondent who testified that the deceased used to run the business at home and was supported by one worker, she used to get Ksh. 5000/- a week from the grade cows and tendered coffee where they could get Kshs. 40,000/- per year
15. Under cross examination the Respondent testified that the deceased used to be a secretary at Aguthi Secondary School but left for farming and that she was 50 years at the time of her death.

DETERMINATION

16. The principles upon which an appellate court can interfere with an award of general damages are well settled as follows:

KIVATI vs COASTAL BOTTLERS LTD CA NO. 69 OF 1964

“The court of appeal should only disturb an award of damage 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”

This view was cited with approval in the case of KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICE GATHONGO KANINI vs AM LUBIA & OLIVE LUBIA (1982-80) 1KLR727 quoted by the Respondent.

17. In the case before the court the question therefore will be whether the trial court took into account any irrelevant fact while arriving at the award herein to enable the court interfere with the same since the issue is not whether a different court would have arrived at a different award on the same fact.
18. I would therefore start by looking at the multiplier of 15 years awarded by the court to the deceased. It is not in dispute that the deceased was 50 years old at the time of the accident. It is also not in dispute that the same was a business lady and a farmer and as such there is no set retirement age. The Appellant has urged the court to interfere with the holding on the basis that it did not take into account the exigences of life and the declining life expectancy in Kenya and relied on the authority of JANE KAMAU Supra. It should be noted that in the said authority having taken into account these factors the court therein proceeded to apply a multiplier of 13 years in respect of an employed deceased who was aged 37 years.
19. This authority is not relevant to the case before me as the deceased here was a business lady and therefore I find that a multiplier of 15 years award by the court was reasonable and decline to interfere with the same.
20. On the issue of multiplier I have noted that the trial court in arriving at Kshs. 7000/- used what he termed “middle grade”. The question to be addressed is whether 7000/- is a middle ground between 10,000/- and 3000/- proposed by the Appellant.
21. From the evidence tendered before the trial court it is clear that the deceased was earning some income from her business and farming activities taking into account the fact that she left her job as a secretary at Aguthi Secondary School her monthly income must have been more than her monthly salary as a secretary. I also note that the authority relied upon by that the authority of DORCAS AMUNGA supra is distinguishable with the case before the court.
22. I am of considered view that the trial magistrate not wrong in using his discretion herein and in this I find support in the holding of Musinga J as he then was in the case of ANN NJOKI NJENGA v UMOJA FLOOR MILLS & ANOTHER 2006ekl wherein the judge awarded Ksh. 10,000/- in respect of a deceased businessman who did not have proof of his income. I would therefore decline to interfere with the trial court find herein.
23. Having looked at the evidence tendered before the trial court and the submission by counsels

herein I am of the considered view that the Appellant has not placed any material before the court to enable me interfere with the judgment of the trial court. I therefore find that the appeal herein lacks merit and dismiss the same with cost to the Respondent.

Dated at Nyeri this 12th September 2013.

J. WAKIAGA

JUDGE

Court: Delivered on 6th February 2014

in the presence of

Mr. Kimunya for Cheronno for appellants and Nzavi for the appellant and Respondent.

J. WAKIAGA

JUDGE