



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, P. KIAGE & O. ODEK, J.J.A)

CIVIL APPEAL NO. 86 OF 2016

BETWEEN

**DICKSON TAABU OGUTU (Suing as the legal representative of the estate of
WILBERFORCE OUMA WANYAMA.....APPELLANT**

AND

FESTUS AKOLO.....1ST RESPONDENT

MARGARET ONYANGO ODUORI.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Busia (F. Tuiyott, J), dated 01st February, 2016

in

High Court Civil Appeal 27 & 30 of 2014)

JUDGMENT OF THE COURT

This matter lies before this Court as a second appeal. The brief background leading to this appeal is as follows; Wilberforce Ouma Wanyama (the deceased) was involved in a fatal road accident along Busia Mumias Road on 18th September 2013. The said accident was occasioned by the 1st respondent who was driving a tractor of Registration Number KAE 147S. The appellant, a brother to the deceased and the personal representative of his estate sued the respondents in the Chief Magistrate's court at Busia via Civil Case No. 68 of 2014. The suit was successful and judgment was entered in favour of the appellant as follows;-

- a) Pain and suffering Kshs. 20,000
- b) Loss of expectation of life Kshs. 80,000
- c) Loss of dependency Kshs. 1,200,000
- d) Special damages Kshs. 20,000

Total Award Kshs. 1,320,000

It is important to note that the trial magistrate held that the deceased was the sole provider for his parents, his wife and his daughter. And therefore calculated the loss of dependency ratio as 2/3 on the deceased's income of Kshs. 5,000 per month.

Both the appellant and respondent were aggrieved by the judgment and so filed separate appeals which were later consolidated. The learned Judge F. Tuiyott, J considered the submissions and evidence presented before the court and concluded that there was no evidence to support the assertion that the deceased supported his aged parents and his wife, who was not listed as a dependant in the pleadings. The learned Judge

interfered with the trial magistrate's judgment and reduced the dependency ratio to 1/3, which reduced the loss of dependency from Kshs. 1,200,000 to Kshs. 970,000. The final award was as follows;

- a) Pain and Suffering Kshs. 20,000
- b) Loss of Expectation of Life Kshs. 80,000
- c) Loss of Dependency Kshs. 970,000
- d) General Damages Kshs. 20,000

Total Award Kshs.1,090,000

Aggrieved by the judgment, the appellant filed the instant appeal containing 4 grounds which, abridged, are that, the learned judge erred by;

- a) Failing to properly exercise his discretion in assessing damages for loss of dependency hence arriving at a gross under estimation of the loss suffered by the dependants of the deceased.
- b) Adopting a dependency ratio of 1/3 against the well laid down principles of law.

During the hearing of the appeal, **Mr B. Kapere** appeared for the appellant, while **Ms D. Odhiambo** appeared for the respondents. Both parties had filed written submissions and both Counsel elected not to highlight the same.

In the written submissions, the appellant asserted that the evidence adduced at the trial court clearly demonstrated that the deceased had one wife, a child and supported his aged parents. On the basis of this, the trial magistrate adopted the correct dependency ratio of 2/3. However, the Judge of the first appellate court made an erroneous finding that the deceased had only one dependant, his child and reduced the ratio to 1/3. The learned Judge had no basis to come to this conclusion yet the respondents' had proposed the said ratio of 2/3 in their submissions at the trial court.

In assessing damages under the **Fatal Accidents Act**, the factors to consider are the age, the expectancy of the deceased's working life, the ages and expectations of life of his dependants, net earning power and the proportion of his net income which he would have made available to his dependants. Therefore, the learned Judge in arriving at the conclusion that the deceased's child was his only dependant ought to have considered her age and expectations not the fact that she was the sole dependant.

The Court was implored to set aside the dependency ratio as arrived at by the learned Judge and substitute it with the appropriate 2/3 ratio; and to award costs of this appeal to the appellant.

In opposition, it was asserted that the issue of dependency ratio is an issue of fact and not law. Counsel cited the holding in **JANE CHELANGAT BAR V ANDREW OTIENO ONDUU [1982 – 1992] 2 KAR 288 [1990 – 1994] E.A 47** in support of his assertion. The issue is pegged on evidence and not a point of law.

Further, the Court was implored to be careful before interfering with the finding of the learned Judge unless it is revealed that he indeed misapprehended the facts and applied the wrong principles of law. He cited **Section 2** of the **Insurance (Motor Vehicle Third Party Risks) Amendment Act** and submitted that the Court cannot make an award for dependency in the absence of evidence. It was incumbent upon the appellant to produce evidence of the said dependency and from the record, the appellant did not mention the parents as being dependants of the estate and he did not mention the extent to which the minor was depending on the deceased. Hence the learned Judge could not factor them in as he determined the ratio.

Lastly, it was argued that the court is not bound by parties' submissions but rather by the law and the evidence presented before it. Hence the court was not bound to hold on the ratio as per the submissions of the respondents. Since the appellant failed to give evidence to convince the court to increase the ratio, this appeal lacks merit and ought to be dismissed with costs.

We have evaluated the record of the appeal and the submissions by Counsel. We are aware of our duty as the second appellate Court is limited to matters of law. We are also persuaded by the dicta of Onyango Otieno, JA in **KENYA BREWERIES LTD V GODFREY ODOYO [2010] eKLR**;

*“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.” (See *Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125*)*

The respondent argued that the life dependency ratio, which is the sole issue on this appeal, is a matter of fact and not law. The threshold of what constitutes matters of law has been well settled by the Supreme Court in **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 3 OTHERS [2014] eKLR**;

“[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

a. the technical element: involving the interpretation of a constitutional or statutory provision;

b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;

c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

From the foregoing, we distil that the issue before this Court is not just a matter of fact but one of law as well since the Court has been called upon to evaluate the evidentiary conclusion of the High Court. We then proceed to determine whether or not the learned Judge erred by reducing the life dependency ratio based on the fact that the deceased had only one dependant, his child.

From the record, it is clear that in the Plaintiff that the appellant pleaded that the deceased took care of their aged parents and his daughter. The only mention of a wife, came up during cross examination. It is trite law that reliefs sought from court can only flow from the pleadings. As was indicated in **THETA TEA COMPANY LIMITED & ANOTHER V FLORENCE NJAU NJAMBI [2002] eKLR;**

“We may usefully start by quoting the words of Lord Goddard, C.J in BONHAM CARTER V HYDE PARK HOTEL LTD, (1948) 64 T.L.R 177, which were cited with approval by this Court in KENYA BUS SERVICES & ANOTHER V FREDRICK MAYENDE (1988-92) 2 KAR, 232. Lord Chief Justice Goddard said:

“Plaintiffs must understand that if they bring actions for damages, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying ‘this is what I have lost, I ask you to give me the damages’. They have to prove it.”

The onus was on the appellant to prove that their aged parents were indeed dependent on the deceased and the extent of loss they have suffered considering the fact at the time of the hearing the appellant, also their son, had a job at the County Governor’s office. We reiterate the holding in **ALBERT KUBAI MBOGORI V VIOLET JEPTUM RAHEDI [2017] eKLR;**

“The degree of dependency on the deceased’s income is a matter of fact. In Boru –vs-Onduu [1982-1988] KAR 299, the Court expressed that,

“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation.”

The appellant did not plead in the Plaintiff that the deceased had a wife nor prove the extent to which his aged parents were dependent on the deceased nor the loss suffered. In those circumstances find that the learned Judge did misapprehend the facts nor apply the wrong principles of law in holding that the appropriate life dependency ratio is 1/3. He did not err and we have no basis to interfere with his decision.

In the result, this appeal lacks merit and is hereby dismissed with no order to costs.

DATED and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.