



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 48 OF 2016

BETWEEN

MARY OSANO (Personal Representative of the
estate CHARLES OTWORI OGECHI - DECEASED).....APPELLANT

AND

SIMON KIMUTAI.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (Karanjah, J), dated 13th April, 2016

in

HCCC No. 349 of 2010)

JUDGMENT OF THE COURT

The appellant in her capacity as the widow of the late Charles Otworu Ogechi (deceased) and the legal representative of his estate sued the respondent. In the plaint filed in the High Court at Kisii, the appellant pleaded that on or about the 30th August 2009, the deceased was travelling as a passenger in motor vehicle Reg No. KBB 459H, when an accident, occasioned by motor vehicle Reg No. KBD 114P, belonging to the respondent, occurred along the Kisii-Keroka Road. The respondent's said motor vehicle was at the time driven by the respondent's driver and/or agent one, James Momanyi Nyaberi. It was pleaded that the said driver and/or agent drove the respondent's motor vehicle in a manner which was so negligent that it collided with the vehicle in which the deceased was travelling thereby causing him fatal injuries. The said driver/agent drove the motor vehicle at a speed which was excessive in the circumstances; without due care and attention to other road users; overtook at a blind corner of the road; failed to observe traffic rules and; the Highway Code, among other elements that led to the fatal accident. At the time of his death, the deceased was aged 46 years and was survived by the appellant and their two sons, aged 9 and 7.

The claim was made under the Law Reform and Fatal Accidents Act and the appellant prayed for judgment against the respondent for;

- (a) Special damages of Kshs. 36,000
- (b) General damages as outlined in paragraph 10 of the plaint
- (c) Costs and interests of the suit
- (d) Any other relief the honourable court would deem fit

The respondent filed a defence and denied all the allegations made against him by the appellant, particularly those of negligence. He contended that if indeed the accident occurred, then it was inevitable and without negligence on his part. In the alternative, the respondent argued that the accident was solely and/or substantially contributed to by the negligence of the driver of motor vehicle Reg No. KBB 459H, in that he drove his vehicle without due care and attention and sufficient regard for the safety of other road users; drove at an excessive speed in the circumstances and; collided with motor vehicle Reg No. KBD 114P. The respondent thus prayed for the dismissal of the suit against him.

During the pendency of the hearing, a consent was entered into by the parties on liability against the respondent at the ratio of 65% to 35%.

At the end of the trial, the learned Judge Karanjah, J delivered a judgment on 13th April 2016 and held that even though the deceased earned a gross salary of Kshs. 103,802 per month, relevant documentary evidence placed before the court proved that a multiplicand of Kshs. 40,736 was sufficient being the difference between the deceased's basic salary and net salary. For special damages he held that the appellant was entitled to Kshs. 6,000. Hence the total sum awarded to the appellant was;

(a) Loss of dependency as follows: $\text{Ksh } 40,736 \times 12 \times 19 \times 2/3 = \text{Ksh. } 6,191,872$

(b) Special damages: Ksh. 6000

(c) The total amount: Ksh. 6,397,872/= less 35% (i.e. Ksh. 2,239,255/-) leaving the ultimate balance of Ksh. 4,158,617/- together with costs and interest.

The appellant was aggrieved by the judgment of the High Court and filed this appeal, on 4 grounds, namely that the learned Judge erred in law and fact by;

a) Misapprehending the evidence relating to the deceased's earnings thereby assessing the damages for loss of dependency at an erroneous estimate.

b) Failing to take into account the legitimate earning of the deceased.

c) Reducing the special damages whilst the same was admitted by the parties.

d) Awarding loss of life of expectation of life and pain and suffering lower compared to the circumstances of the case.

When the appeal came up for hearing, learned Counsel **Mr Nyasimi** appeared for the appellant while **Mr Kimanga** appeared for the respondent. Only the appellant had filed its written submissions and a bundle of authorities.

Mr Nyasimi abandoned the last ground of appeal and stated that the appeal was against quantum only. He contended that the learned Judge awarded a low loss of dependency because he subtracted some income from the deceased's salary at the University of Nairobi on permanent and pensionable terms. He treated some of the deductions as statutory yet they were savings. The deceased's net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions amounted to Kshs 28,000 thus the deceased's actual net pay per month was Kshs 70,000 not the Kshs 40,000 that the judge used as a multiplicand.

Counsel urged the Court to interfere with the amount given as loss of dependency as follows; $\text{Kshs } 70,000 \times \text{Kshs } 12 \times 15 \times 2/3 = \text{Kshs } 8,400,000$.

Mr Kimanga opposed the appeal citing that the learned Judge properly evaluated the evidence. He did not treat all the deductions as statutory and was guided by the content of the payslip. Counsel continued that the deceased also had some temporary employments from time to time that the learned rightfully disregarded as they were not ascertainable nor assured for 19 years. Counsel conceded that the appellant deserved Kshs 100,000 each for pain and suffering and for loss of expectancy of life. He urged the Court to dismiss the appeal save for the conceded corrections.

As the first appellate Court we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions, see **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123** and **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES V JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR**.

This appeal is very straight forward as Counsel for the appellant clearly stated that he is appealing on the quantum on the loss of dependency. He opined that the learned Judge erred in using Kshs 40,000 as the multiplicand as opposed to Kshs 70,000 which was the deceased's net salary at the time of his untimely death. From the record, we can see that the learned Judge reasoned as follows in coming up with the total loss of dependency amount;

“In this court's opinion, regard being given to relevant documentary evidence placed before it, a multiplicand of Ksh. 40,736/= being the difference between the deceased's basic salary and net salary and a multiplier of nineteen (19) years based on a retirement age of sixty five (65) years and a dependency ratio of 2/3rds shall suffice for loss of dependency.”

This Court is therefore tasked to consider whether the learned Judge erred by using the figure of Kshs 40,000 as the multiplicand instead of the Kshs 70,000. We appreciate that the principle behind his finding is that courts must factor in statutory deductibles prior to arriving at the appropriate figure to use as a multiplicand. The same was held by this Court in **ROSEMARY MWASYA V STEVE TITO MWASYA & ANOTHER [2018] eKLR**;

“The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546/=x 1/3=39,512.”

Counsel for the appellant submitted that the deceased's net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions as contained in the payslip are; P.A.Y.E at Kshs 23,947; NHIF at Kshs 320 and NSSF at Kshs 3748 which totals to Kshs 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.

Moreover, Counsel for the respondent concurred in his submissions at the High Court that a sum of Kshs 70,000 was sufficient to be used as a multiplicand. Despite noting this in his judgment, the learned Judge still used a much lower figure. We find therefore that he misdirected himself even in the face of admission of the proper multiplicand by respondent's Counsel.

It being common ground that the proper multiplicand is Kshs. 70,000, it shall be used in calculating loss of dependency. As it is agreed that a sum of Kshs. 200,000 was left out in error by the learned Judge, it shall be included.

In the result, the award of the learned Judge is set aside and the final assessment of damages shall be as follows;

- (a) Loss of dependency as follows: $Kshs. 70,000 \times 12 \times 15 \times \frac{2}{3} = Kshs. 8,400,000$
- (b) Pain and Suffering Kshs. 100,000
- (c) Loss of expectancy Kshs. 100,000
- (d) Special damages: Kshs. 6,000
- (e) The total amount: Kshs. 8,606,000 less 35% (i.e. Kshs. 3,012,100) leaving the ultimate balance of Kshs. 5,593 900 together with costs and interest.

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.