



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & KANTAL, J.J.A.)

CIVIL APPEAL NO. 280 OF 2018

BETWEEN

PATRICK KARIUKI MUIRURI.....1ST APPELLANT

RACHAEL WANJIRU KARIUKI MUIRURI2ND APPELLANT

JOHN SEBASTIAN MUIRURI3RD APPELLANT

JACINTA WANGUI KARIUKI MUIRURI (Suing as the personal representative of

DR. JAMES NG'ANG'A KARIUKI MUIRURI (DECEASED).....4TH APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 31st May, 2018 in H.C.C.C. No. 4 of 2010)

JUDGMENT OF THE COURT

The incident that took place in the early morning of 24th January, 2009 will have long term consequences and effect on the family of the appellants (**Patrick Kariuki Muiruri (1st appellant)**, **Rachael Wanjiru Kariuki Muiruri (2nd appellant)**, **John Sebastian Muiruri (3rd appellant)** and **Jacinta Wangui Kariuki Muiruri (4th appellant)**). The 1st appellant was the father of **Dr. James Ng'ang'a Kariuki Muiruri ("the deceased")** and is the husband of the 4th appellant and father of the 2nd and 3rd appellants.

On the said morning the deceased was travelling with his younger brother, **John Gachera Muiruri**, in a motor vehicle in the Westlands area of Nairobi. They were suddenly blocked by another motor vehicle and when the deceased and his brother came out of their vehicle to find out why they were being blocked, an altercation occurred. The occupants of the other vehicle were police officers **Dickson Munene Mwangi** and **Alexander Chepkonga Francis**. One of the police officers produced a firearm and shot the deceased 3 times point blank. The deceased was rushed to the nearby MP Shah Hospital where he was pronounced dead on arrival.

There is no doubt that the deceased, aged 29 at time of death, had a checkered and illustrious career before him had he lived. He had a Bachelors of Law degree from the University of Kent and a Masters of Law degree in International Law with distinction from the Queen Mary and Westfield College at the University of London. He had also completed studies and was awaiting conferment of a Doctors of Philosophy (PhD) degree in International Law from the University of Sheffield, United Kingdom, and he offered part time lectures in International Law at the same university.

The two police officers were tried and convicted in a criminal court, and although the respondent (Attorney General) filed a defence, the issue of liability was settled by a consent recorded before the trial judge on 20th April, 2016 when it was agreed by the parties that liability attach fully against the respondent.

In the plaint filed at the High Court of Kenya at Nairobi, the appellants set out particulars of the injuries the deceased had suffered from the gunshot wounds and gave breaches of statutory duty on the part of the respondent sued vicariously because of the acts of the police officers. There were also set out in the plaint particulars of negligence on the part of the said police officers. The deceased's academic achievements were also set out in the plaint and it was stated that the appellants as the deceased's family had invested substantial sums of money in his education and afforded him unfettered emotional support and love in order to see him successfully through his education, which investment

had been irreversibly destroyed through the senseless shooting of the deceased by the said police officers. The suit was brought on behalf of the deceased's parents (the 1st and 4th appellants), then said to be aged 63 and 54 years respectively.

Particulars of special damages were given at Shs.1,557,730 and it was said that the deceased at the time of death earned a sum of £12,000 per annum with great prospects of advancement in his career in law, and that his income would have been approximately Kshs.700,000 per month and would have risen significantly in the course of his career. The 1st appellant produced before the trial judge a letter dated 5th July, 2017 from **Professor Nigel D. White**, Professor of Public International Law at the University of Nottingham addressed to the appellants' lawyers. Prof White had supervised the deceased's PhD programme and it was said in the letter amongst other things that Prof White had been a professor of International Law at University of Sheffield and that the deceased was an excellent PhD student who was completing his thesis within the specified time period and without the need for any corrections. The deceased had been awarded a few scholarships by the University of Sheffield to enable him to take the PhD and he undertook teaching for the law school for all the years he was a student. That entailed teaching on average 6-8 seminar groups in a week in Public International Law consisting both second and final year undergraduate students. Further, that the deceased was an immensely popular teacher with a great rapport with both students and staff. Prof White stated further that the salary for a University Lecturer in the United Kingdom was £38,000–54,000 and that a successful academic should be promoted to a Senior Lecturer/Readership earning £50,000-71,000 after 10-15 years and a Chair/Professorship £59,000–97,000 after 20 to 25 years and after 40 years a lecturer can retire on 50% of his average salary.

The special damages particularized in the plaint were prayed for as were general damages under the Fatal Accidents Act for the benefit of the deceased's dependants, general damages for the benefit of the estate of deceased, exemplary damages, interest and costs.

With consent of the other appellants the suit proceeded by use of a witness statement which had been made by the 1st appellant who also testified briefly before the trial judge. He narrated how he had received the sad news of the death of his son and events that followed including the report of the shooting to the police; a meeting of the 1st appellant with a special rapporteur invited to Kenya by the government to investigate extra judicial killings by the police; and statements that had been made by government officers following the fatal shooting. He also narrated the various academic qualifications the deceased had acquired and produced documentary evidence to prove special damages incurred following the death of the deceased.

On the issue of earnings by the deceased, it was the 1st appellant's testimony that before the deceased's death he had come back home from the United Kingdom awaiting to graduate, and on cross-examination:

“The deceased had been promised to get a job upon his graduation. My son had already finalized his studies at Sheffield.”

Sergon, J. who heard the case recognised that since the issue of liability had been agreed by the parties, the task before him was to assess damages to be awarded to the appellants. The judge considered the submissions made and in the end gave judgment to the appellants against the respondent as follows:

KSHS.

(i) Pain and suffering	100,000
(ii) Loss of expectation of life	200000
(iii) Loss of dependency	12.000.000
(iv) Special damages	1,557,730
(v) Exemplary damages	2,000,000
Total	Kshs.15,857,730

Costs were awarded to the appellants and interest was ordered to take effect from the date of judgment until full payment.

The appellants were dissatisfied with those findings and filed a Notice of Appeal against the whole of the said judgment. There are 5 grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by their advocates, **Mbugwa, Atudo & Macharia Advocates**. The learned judge is faulted for inferring that the deceased was not in employment at the time of his death. It is also said that the judge reached conclusions of fact at odds with the evidence presented before him; and further that the judge erred by stating that there was no evidence that the deceased's family would have heavily depended on him; and further, that the judge erred by finding that the dependency ratio of one third was appropriate. It is said that exemplary damages awarded were too low in the circumstances of the case and, finally, that the judge failed to consider the appropriate principles of law applicable to awarding damages, given the circumstances of the case and thereby awarded damages that were inordinately low. We are therefore asked to interfere with the judgment and enhance damages for loss of dependency and the dependency ratio; and also that we review and vary the award on exemplary damages and award costs of the appeal to the appellants.

When the appeal came up for hearing before us on 4th June, 2019, the appellants were represented by **Mr. T.M. Macharia Advocate**, who had filed written submissions dated 10th April, 2019 which we have perused. There were no authorities filed to support the various propositions and submissions. In a highlight of the said submissions Mr. Macharia submitted that the deceased was a Doctor of Laws and a junior lecturer at Sheffield International University and he therefore faulted the learned judge for finding that the deceased was unemployed. He referred to the letter by Prof White as fortifying his submission that the deceased was employed. Counsel faulted the learned judge for what counsel thought was failing to take account of the deceased's future job prospects. On exemplary damages, it was Mr. Macharia's view

that the sum of Shs.2,000,000 awarded was too low and counsel proposed that Shs.20,000,000 should have been awarded instead. He cited the case of **KIPYATOR NICHOLAS KIPRONO BIWOTT v CLAYS LIMITED & 6 OTHERS [2000] eKLR** where exemplary damages of Shs.15,000,000 had been awarded and asked us to award the same sum.

Learned counsel **Mr. C.M. Mutinda** for the respondent had not filed any written submissions but made an oral address in opposing the appeal. Counsel thought that the award made was fair and reasonable and he referred us to the record to support his submission that the deceased was not employed. According to counsel, the letter by Prof.

White referred to times in the future and what the deceased would have earned had he remained at that university and been employed. According to counsel the deceased was still a student. On the multiplicand employed by the learned judge, Mr. Mutinda submitted that the sum of Shs.120,000 was fair and reasonable. He made the same submission in respect of exemplary damages thinking that the sum of Shs.2,000,000 was fair. He distinguished the **KIPYATOR BIWOTT** case (supra) which involved a defamation case where, according to counsel, different standards applied.

This is a first appeal and we are duty bound in law to reconsider the record to satisfy ourselves whether the conclusions reached by the trial judge are sound in law and to depart from those findings if we find that the trial court has not carried out its mandate as required in law. The following passage appears in the case of **SELLE v ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] E.A. 123** on the duty of the 1st appellate court:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

As we have stated, liability was agreed and was not an issue before the learned judge. This appeal therefore concerns award of damages which the appellants attack as being low in the circumstances of the case. As far back as 1981 in one of the cases involving an attack on award of damages, this Court in the case of **BUTT v KHAN [1981] KLR 349** where the trial court had awarded a sum of Shs.400,000 as general damages where a child had been knocked down by a motor vehicle as he crossed the road and the defendant appealed the decision, it was held on appeal that an appellate court cannot interfere with the decision of the trial court unless it is shown that the judge proceeded on the wrong principles of law and then arrived at his conceived estimates. As per Law, JA at page 356:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

The appellants contend on the issue of whether or not the deceased was employed, that the judge was wrong to hold that the deceased was not employed. We have in this judgment reproduced the evidence of the 1st appellant where he stated that the deceased had come back home from Sheffield International University in England and was awaiting graduation. We have also reproduced the contents of the letter by Prof White. The letter gives a general view of what a lecturer who had completed his PhD would earn on first employment and the future prospects of that lecturer should he continue teaching until retirement. The letter does not state in any way that the deceased was employed by Sheffield International University.

The appellant also produced an email from the said Prof White dated 2nd September, 2005 which was addressed to the deceased. Prof White was informing the deceased that he had been granted a university scholarship to undertake a research degree under Prof White’s supervision starting later that month. The scholarship would cover the deceased’s overseas student fee and the deceased would be provided with maintenance for the year 2005/2006 at £12,000. The learned trial judge considered all these material and concluded that the deceased was not employed at the time of death.

We have considered the material available before the judge and have reached the same conclusion the deceased was not employed at the time of death. The judge employed a multiplicand of Shs.120,000 per month and a multiplier of 25 years at the dependency ratio of one third which gave the sum of Shs.12,000,000. This was reasonable in the circumstances where employment or earnings was not proved, and where the deceased was aged 29 at the time of his unfortunate death.

One of the other grounds of appeal relates to dependency. The appellants contend that they were entitled to more than one third dependency awarded by the judge. We have already found that the deceased was not employed. Looking at the record and the evidence given by the 1st appellant, there was no material placed before the trial judge at all to suggest that the appellants would be entitled to more than one third dependency. We cannot find any error reached by the judge in that respect.

On the issue of exemplary damages, the judge awarded Shs.2,000,000. There is no doubt that the attack on the deceased by the police using dangerous weapons was callous to the extreme. The attack was apparently unprovoked and led to an unnecessary death of a promising Kenyan. Having said that and considering the principles applicable to award of damages, we do not think that the award of Shs.2,000,000 exemplary damages was too low as to require our interfering with the award by the judge. The same will stand.

We have considered the whole record and the grounds raised in the memorandum of appeal and have not found any merit in any of them. The appeal has no merit and is dismissed. Each party to bear its own costs of the appeal.

Dated and delivered at Nairobi this 27th Day of September, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR