



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 7 OF 2015

BETWEEN

MILCAH WANGUI MBUGUA

CAROLINE NDUTA KINYIRA (As administrators of the estate of

IGNATIUS KINYIIRA KANYUNGU..... APPELLANT

AND

KENNETH MUUIYA NGAI.....RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 10th December, 2015

in

H. C. C. C. No. 7 of 2013)

JUDGMENT OF THE COURT

1. This is a second appeal from the decision of the High Court sitting in Embu (**Muchemi J.**) in which the Court partly interfered with an assessment of damages made by the Chief Magistrate's Court (**Mrs. Wachira**) in a running down matter. The appellants before us, **Milcah Wangui Mbugua** and **Caroline Nduta Kinyira** (the appellants) are the administrators of the estate of **Ignatious Kinyira Kanyungu** (the deceased). They are represented before us by learned counsel **Mr. Ndumu Kimani**. They filed suit in December 2009 claiming damages on account of the death of the deceased who was knocked down by a vehicle owned by the Respondent herein, **Kenneth Mucuiya Ngai**, along the Embu-Kiritiri road on 18th April 2009. Before us, he is represented by learned counsel **Mr. Kinyua Muriithi**.
2. Liability for the accident was agreed at 60% as against the respondent and 40% against the deceased and a consent judgment was recorded before the trial Court on liability. The Court also heard oral evidence and received documentary evidence from witnesses on both sides before making the following awards in damages:-

“Pain and suffering

Kshs 10,000/=

Loss of expectation of life	Kshs 100,000/=
Special damages	Kshs 79,610/=
Loss of dependency	Kshs 3,840,000/=
TOTAL	Kshs 4,029,610/=
Less 40% Liability	Kshs 1,611,844/=
Final Total	Kshs 2,417,766/=”

3. The loss of dependency under the **Fatal accidents Act** was calculated on the finding made by the trial Court that the deceased, who was aged 50 years, earned an average of Sh. 60,000 monthly and would have worked for another 10 years before retirement. A multiplier of 8 years was then adopted and a dependency of 2/3 applied to the multiplicand of Sh. 60,000. Somehow, however, the trial Court used the multiplicand as quarterly earnings and arrived at the figure of Sh.3,840,000 by multiplying (60,000 x 4 x 8 x 2/3). That arithmetic was, of course, erroneous as the final figure should have been Sh.1,280,000 and not Sh. 3,840,000.
4. The Respondent challenged the finding that the multiplicand was Sh. 60,000 monthly, as well as the award of Sh. 79,610 in Special damages, and the failure to deduct the award under the **Law Reform Act** from the award under the **Fatal Accidents Act**. The High Court reconsidered the evidence and found that Special damages were proved at Sh. 69,610 and gave judgment for that sum. It also re-assessed the evidence on the deceased’s earnings and found that he was earning Sh. 60,000 quarterly and not monthly. However, the Court imposed an Income Tax deduction of 30% and arrived at the figure of Sh. 42,000 per quarter which it applied as the multiplicand. It also deducted the award under the **Law Reform Act** from the total award, leaving the amount payable to the appellants at Sh.965,610. Finally, the Court noted the erroneous calculation made by the trial Court on Loss of dependency.
5. The appellants were aggrieved by those findings and raised two issues in their memorandum of appeal, thus:-
 1. **“That the Learned Judge erred in law in finding that the income of the deceased was quarterly and not monthly and hence arrived at a wrong multiplicand.**
 2. **The Learned Judge erred in law in not finding that the deceased's monthly income was net of all deductions and hence not subject to a deduction of 30%.”**
6. In his submissions, Mr. Kimani drew our attention to the evidence on record showing that the deceased was a trained motor vehicle assessor who was in the employment of M/s Express Kenya Ltd earning a monthly salary of Sh. 39,620 before he retired in 1996 to start his own business. There was no direct evidence to prove that he earned Sh. 60, 000 per month, but Mr. Kimani submitted that the evidence on his annual expenditure towards school fees for his three children would establish a monthly income of Sh. 60,000 as found by the trial Court. There was no basis therefore, he submitted, for the High Court to determine that the income was quarterly. As for taxation, Mr. Kimani submitted that there was a finding by the High Court itself that the failure to produce tax returns did not mean that the deceased did not do any business or pay any tax. It was erroneous, therefore, to subject his income to further taxation since the income of Sh. 60,000 was net of taxation.
7. In his counter argument, Mr. Muriithi submitted that the figure of Sh. 60,000 was a mere estimate by the two courts below although it was a specific pleading in the plaint which ought to have been strictly proved. He nevertheless supported the finding of the High Court that the figure was quarterly since the payment of the expenses relied on was quarterly. That would mean the monthly income was Sh.20,000 which Mr. Muriithi conceded was on the low side and the respondent was prepared to accept a monthly figure of Sh. 40,000. He also supported the finding of the High Court that the amount should be taxed.

8. In further response, Mr Kimani said the appellants were prepared to accept Sh. 42,000 as a monthly income, and thus the multiplicand, without any further taxation.
9. We have considered the two issues of law raised by the appellants and this is the view we take of the matter. The High Court was within its mandate as the first appellate Court to analyze and re-evaluate the evidence on record and come to its own conclusions of fact. On a second appeal, this Court will follow a well beaten path as stated in the case of **Jabane – v- Olenja [1986] KLR 661, at page 664**, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”

10. Many of the factual findings of the two courts below have not been questioned in this appeal, and all we have to grapple with are the two issues of law; that is, whether there was proper evaluation of the evidence on the multiplicand, and whether the final figure on dependency ought to be taxed.
11. There is ample authority to support the proposition adopted by the High Court that documentary evidence of earnings is not the only way to prove that the deceased earned income. We may repeat what this Court said in the case of **Jacob Ayiga Maruja & Another vs. Simeon Obayo (2005) eKLR, thus:-**

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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 and 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 this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

12. The evidence upon which the two Courts below relied to calculate the multiplicand came from the 1st appellant as follows:-

“My husband was earning about Kshs 60,000/- per month. I do not have records to prove. But he supported the family and paid university fees for Caroline Nduta – where she was in parallel program and he paid Kshs 163,000/- per year, Tabitha Wamere was in same college in parallel program and fees was Kshs 149,000/- per year, Rosemary Njeri was still schooling primary school in Eldoret, Kshs 39,000/- per year. He paid their hostel at Kshs 38,500/- per year and maintenance of Kshs 120,000/- per year in food and other expenses. My house rent of Kshs 4,000/- in Eldoret, my maintenance of Kshs 6,000/- per month and he paid rent for himself in Nairobi.”

13. The reasoning of the trial court in its finding that the multiplicand was monthly income was this:-

“However she testified that the deceased made money as his family depended on him in that he paid University College fees for Caroline Nduta, Kshs 163,000/- per year, for Tabitha Wamwere Kshs 149,000/- per year. He paid Kshs 39,000/- per year for Rosemary Njeri who was at Hill School Primary in Eldoret. He also paid Kshs 120,000/- per year for their upkeep, Kshs 38,500/- for their hostel, Kshs 4,000/- for the plaintiff's house in Eldoret and Kshs 6,000/- for plaintiff's upkeep in Eldoret. She produced the fees structure for the children as PEX 10(i)-(x). He also had his own house and did his own upkeep. The plaintiff submits that deceased was earning over 60,000/- per month in order to keep his family.”

14. On the other hand the High Court in finding that the multiplicand was quarterly reasoned thus:-

“There is sufficient evidence that the deceased paid school fees for his children and provided for other support for his family to the tune of over Kshs 350,000/-. He cannot be said to be a man of mean resources and the Court would be out of touch with reality of lives of Kenyans to hold the view that there was no proof of income and proceed to use a multiplicand based on minimum wage under the Employment Act. Such a multiplicand would be applicable in a case where there is no evidence of any expenses of the deceased during his lifetime or where the deceased was a mere casual labourer.....”

The trial Court use of the multiplicand of Kshs 60,000/- was based on the evidence of the deceased's expenses which were given in quarterly periods.”

15. With respect, the High Court had no evidential basis for making the finding that “*the deceased’s expenses were given in quarterly periods.*”

From the extract of the evidence of the 1st appellant reproduced above, it is clear that the expenses were given in annual figures. The figures were accepted by the two courts below and in our own calculation the total annual figure is in excess of Sh. 700,000 which translates into the monthly figure pleaded by the appellants of Sh. 60,000 per month. The factual finding of the trial court was supported by the evidence on record and, for that reason, we find and hold that the High Court misapprehended the evidence and therefore improperly interfered with the finding of the trial court. We allow the appeal on the first ground.

16. As regards the second ground, the High Court had this to say:-

“The trial Court ought to have taken into consideration that the deceased was obligated to pay tax to the tune of 30% of his income amounting to Kshs 18,000/- and reduce the income by that percentage as follows:-

60,000 less 30% (18,000/-) = 42,000/=

The use of multiplicand of Kshs 60,000/= was wrong in that it disregarded payment of income tax and considered that the full income of the deceased as the basis of the multiplicand.”

17. We have no quarrel with the stated principle that it is the civic duty of all citizens of this country to pay tax on all income earned unless it is lawfully exempted. The deceased was not exempt from paying taxes. Indeed the High Court itself rejected an argument advanced by the respondent that the deceased was not paying taxes, holding on the contrary that the failure by the wife of the deceased to trace the payment records did not mean that the deceased was not paying taxes. As we understand it, the appellants’ argument is that the income of Sh. 60,000 was net of income tax deductions, otherwise the deceased would never have been able to pay the expenses tabulated and accepted by the two courts below. It should therefore be carried forward as the net multiplicand in calculating loss of dependency. With respect, we are persuaded by that argument. In the result we allow the appeal on the second ground also.

18. The upshot is that this appeal is allowed. We set aside the award made in respect of Loss of dependency and substitute therefor a multiplicand of 60,000 net of tax. Judgment on that head of damages will thus be $60,000 \times 12 \times 8 \times \frac{2}{3} = 3,840,000$. From this shall be deducted the agreed percentage of the deceased’s negligence at 40% leaving a net figure of Sh. 2,304,000. The rest of the award made by the High Court shall remain undisturbed. The appellants shall have the costs of the appeal.

Orders accordingly.

Dated and delivered at Nyeri this 24th day of June, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR