IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL APPEAL NO. 237 OF 2004

BETWEEN

ELIPHAS MUTEGI NJERI & ANOTHER .....APPELLANTS

AND

STANLEY M'MWARI M'ATIRI.....RESPONDENT

(Appeal from the decree of the High Court of Kenya at Meru (Onyancha) dated 28th July, 2004

in

MERU H.C.C.C. NO. 149 OF 2000)
****
JUDGMENT OF THE COURT

The appellants in this appeal were the defendants in the superior court whereas the respondent was the plaintiff.

According to the pleadings filed in the superior court it was averred that the second appellant, Catholic Diocese of Meru, was the registered owner of motor vehicle Reg. KZB 929 Peugeot Pick-Up and that at the material time the first appellant was an employee of the second appellant.

The particulars of the claim were that on or about 26th April 2000 while the deceased was lawfully walking far off the tarmac along Meru Ndabu Road at Twingithu River the 1st appellant negligently occasioned an accident whereof the deceased sustained fatal injuries. As a result, the respondent instituted HCC No. 149 of 2000 on behalf of the deceased estate and his dependants. As expected the defendants filed a joint defence on 14th December 2000 denying the alleged negligence.

After a full hearing the superior court Onyancha J. gave judgment in favour of the respondent in the total sum of Ksh.890,000/= comprising of:-

1.	***Loss of dependency***	***-***	***Kshs. 800,000/=***
2.	***Pain and suffering***	***-***	***Kshs. 10,000/=***
3.	***Life expectancy***	***-***	***Kshs. 100,000/=***
4.	***Special damages***	***-***	***Kshs. 250/=***
5.	***Less accelerated discount***	***-***	***Kshs. 20,250/=***
	Total	***-***	***Kshs.890,000/=***
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Aggrieved by the said judgment the appellants have filed the appeal listing the following grounds:-

> ***"1. The Learned Judge of the superior court erred in law by applying the wrong principles in arriving at the award of general damages for loss of dependency and thus giving an excessive award of Kshs.800,000/= regard being had to the evidence adduced at the trial and therefore erroneous in that;***
>
> ***(a) The learned Judge applied a ratio of 2/3 instead of 1/3 since the deceased was unmarried.***
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> ***(b) The learned Judge applied a multiplicand of Kshs.5,000/= instead of Kshs.500-1,000/= which was adduced in evidence by the plaintiff.***

2. ***The learned Judge of the superior court erred in law in apportioning liability at 100% as against the appellants while it was clear from the evidence that the deceased contributed towards the occurrence of the accident.***

3. ***The learned Judge of the superior court erred in law by not taking into account the award under the Fatal Accident Act when arriving at the award under Law Reform Act and thus duplicity of awards to the same dependants.***

4. ***The learned Judge of the superior court erred in law in failing to dismiss the suit after having suo motto found that the pleadings as per the plaint were incompetent."***

During the hearing of the appeal the appellant was represented by the learned counsel Mr. Mwirigi Kaburu whereas the respondents were represented by Mr. Ken Muriuki.

In his submissions before us, Mr. Kaburu raised several points but the central ones are that although no evidence was given on behalf of the second appellant, the Diocese, the employer of the 1st appellant, the Diocese was not the owner of the vehicle; the multiplicand used by the Judge was excessive; and finally that the damages awarded in respect of life expectancy of Kshs.100,000/- was not taken into account in that the award in that amount was going to the same dependants who had been awarded damages as dependants under the Law Reform Act.

In opposing the appeal, Mr. Muriuki submitted that the issue of ownership of the accident vehicle was not one of the grounds of appeal. As regards the contention that the multiplicand of Kshs.5,000/= was high for a secondary school teacher he stated that it was reasonable in the circumstances, because there was evidence that the deceased was also earning money from other sources in addition to his salary as a teacher. In this regard counsel submitted that the superior court took into account the totality of evidence in coming up with the multiplicand. One of the critical factors which the court took into account was that the deceased's mother and father were wholly dependent on the deceased and besides the ? dependency rate used by the court did not in law constitute a rigid principle or rule of thumb and the rate adopted must depend on the circumstances of each case. In support of this submission he relied on this Court's decision in the case of ***JANE CHELAGAT BOR V ANDREW OTIENO ONDUU; JOSEPH MUTUKU NYENGO and NAIROBI BUS UNION LTD (1990) 2 KAR, page 288.***

After considering the submissions, we agree with the respondent counsel that the issue of ownership was neither denied in the defence filed by the appellants nor raised in the memorandum of appeal. The same applies to the issue concerning employment. It was never raised in the joint defence. Accordingly, we find no merit on the two submissions.

Regarding the submission on the multiplicand it is not in contest that the deceased was a secondary school teacher. Having considered, that what teachers earn is a matter of public notoriety in that they are invariably gazetted, we are of the view that the salary of Ksh.5,000/= was on the lower side. According to Legal Notice 142/2003 which covers the material time, the salary for a secondary school teacher of the status of the respondent was in the range of Kshs.10,000/= to Kshs.15,000/= per month. In the circumstances we think that the multiplicand of Kshs.5,000/= cannot be said to be excessive.

As regards the failure of the superior court to take into consideration the award under the Fatal Accident Act when arriving at the award under the Law Reform Act we agree with the submission of the learned counsel for the appellant. Indeed, the correct principle was very well captured in the case of ***ASAL V. MUGE & ANOR [2001] KLR 202:-***

> ***"It is evident that the award made under the Fatal Accident Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Reform Act are the same beneficiaries of the estate of the deceased in the latter Act.***
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> ***Although section 2 (5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accident's Act we cannot ignore the fact that the same parties benefit from awards made under both Acts. This is not done then there is a danger of duplication of awards....."***

The Court then went on to reduce the total award by what was awarded for expectation of life. We confirm that this is the path to take.

Accordingly, we reduce the award of Ksh.890,000/= by Ksh.100,000/= to Ksh.790,000/=.

All in all, our inclination is to dismiss this appeal save for the reduction of the total award by Ksh.100,000/= and as a result the rest of the appeal is hereby dismissed with costs to the respondent who in our view has been substantially successful. It is so ordered.

Dated and delivered at Nyeri this 24th day of June, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR