



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, TUNOI & GITHINJI, J.J.A.)
CIVIL APPEAL 167 OF 2002

BETWEEN

JACOB AYIGA MARUJA

FRANCIS KARANI.....APPELLANTS

AND

SIMEON OBAYO (Suing as the administrator of the Estate of

THOMAS NDAYA OBAYO.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Kisumu (Tanui J) dated 30th January, 2002

in

H.C.C.C. NO. 106 OF 2000)

JUDGMENT OF THE COURT

Jacob Ayiga Maruja and Francis Karani, the appellants herein, appeal to the Court against the quantum of damages awarded to *Simon Obayo*, the respondent, who had impleaded the appellants as the Administrator of the Estate of one *Thomas Ndayo Obayo*, the deceased hereinafter. The deceased was killed on or about 19th October, 1998 when he was hit by motor vehicle Reg. No. KAK 470D, the property of the 2nd appellant which was being driven on behalf of the 2nd appellant by the 1st appellant. Both appellants were found wholly liable for the accident and the appeal before us does not attempt to challenge that aspect of the matter. The three grounds of appeal which were argued before us by Mr. Kasamani on behalf of the appellants are that:

“1. The award of General Damages for loss of dependency should not have been awarded (sic). The learned Judge erroneously took into account the alleged earnings of the deceased which was assessed at Kshs.5,000/= per month when there was insufficient evidence to support the allegation that the deceased earned the said sum from his employment as a carpenter.

2. The use of a multiplier of 8 years for a Carpenter aged 53 years whose mandatory retirement age was 55 was grossly erroneous and inflated the award of damages for loss of dependency.

3. The evidence of special damages was insufficient to warrant the award of Kshs.117,325/= made”.

Dealing with the first ground of appeal, Mr. Kasamani submitted that though it had been pleaded in the plaint that the deceased was a carpenter earning Shs.5,000/= per month, no documentary evidence in the form of receipts, income tax returns or anything of that kind was produced in the superior court to support that claim. We readily agree with Mr. Kasamani that claims for lost earnings are in the nature of special damages and must not only be specifically pleaded but must also be strictly proved. That is the general law with regard to special damages. But in this case the respondent was the elder brother of the deceased. He gave evidence to the effect that the deceased was a carpenter in the village. The respondent in his evidence in chief said:

“My brother was 53 years and was a carpenter. He used to earn about Shs.5,000/= every month.

His first born Alfred Ndanya was born on 22/7/84. This is the birth certificate (Exh P (3)). He is in Lurambi Primary School.

The second child is Stephen Ndonga Ndanya who was born 19/4/87. She (sic) is also at school at home Bandachi. Certificate of Birth (exh p(5)).

The last child Joseph Obuvewe Ndanya was 7/9/93. He is in nursery school at home. This is a birth certificate (Exh P(6))”.

When cross-examined the respondent stated:

“I do not have any document to show that my brother was a carpenter. I do not have any document to support that my brother earned Shs.5,000/= a month. I do not know whether my brother filed income tax returns”.

So the respondent’s evidence was that his deceased brother was a carpenter. He said the income earned from that trade was about Shs.5,000/= not that it was Shs.5,000/=. The deceased had three children in school and that must be evidence from which a reasonable tribunal would be able to make an inference that the deceased must have been paying school fees and buying school uniforms for the children. The appellants did not call any evidence to rebut those assertions by the respondent.

And what did the widow of the deceased say in her evidence? She was ***Leonida Khayega Ndanya*** and she listed all the four children of the deceased; the fourth one left out by the respondent was named as Susan Olesia Ndanya born in 1991. She said her deceased husband was a carpenter and that he used to earn Shs.5,000/= per month. She then produced the school reports on her children and stated the classes in which the respective children were in. She even stated the amount of school fees paid for the children. When cross – examined she said she had no documentary proof that her late husband was a carpenter or that he earned Shs.5,000/= per month.

In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. 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 coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail.

On ground two, we know of no law or any other requirement that a self-employed carpenter must retire at age 55. Mr. Kasamani did not point out to us any such provision. The deceased was 53 years old at the time of his death. The learned trial Judge thought he probably would have pursued his carpentry business for some eight more years. There is absolutely no basis upon which we can interfere with that finding. Ground two must also fail.

What has caused us some considerable difficulty is the award of Shs.117,325/= as special damages arising out of funeral expenses. That is the complaint in ground three of the memorandum of appeal. Of that sum Shs.4,000/= was claimed as the cost of the coffin, Shs.5,000/=, was claimed as mortuary bill and Shs.106,850 as funeral expenses. There was another Shs.1,475/= claimed in respect of the filing of an application for letters of administration. We think the claim for Shs.4,000/= as cost of the coffin and Shs.5,000/= as mortuary fee were reasonable in all the circumstances of the case though one would think receipts for these could have been produced. But we are not prepared to differ with the Judge on these items. What is particularly worrying to us is the award of Shs.106,850/= as funeral expenses. The respondent who is a church pastor produced a receipt from the Kakamega Town PEFA Church showing that he had received from that church Shs.115,850/= for the purpose of:

“SUPPLYING FOOD & MATERIALS FOR THOMAS NDANNY OBAYO FUNERAL”

and in his evidence, he said the money was a loan to him and he had to refund it. The materials to be bought or paid for must have been the coffin, (Shs.4,000/=), the mortuary bill (Shs.5,000/=), transportation of the body from Kakamega to its place of interment and so on. We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as “*funeral expenses and other expenses*” were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.

Accordingly, and for the reasons given, we reduce the total award of Shs.503,325/= by Shs.57,326/= leaving the total award at Shs.466,000/=. To that limited extent the appeal succeeds and we award to the appellants one third of the costs of the appeal. Those shall be our orders.

Dated and delivered at Kisumu this 24th day of June, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR