



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 157 OF 2007

ABDALLA ISSA.....1ST APPELLANT

EMKAY CONSTRUCTION COMPANY LIMITED.....2ND APPELLANT

-VERSUS-

LEONIDA M. ALUSA.....1ST RESPONDENT

MOHAMMED L. ILONDANGA

(suing as the Administrators of the Estate of

the late ANDRIANO MUHANJI LIKUYANI).....2ND RESPONDENT

(Being An appeal from the Judgment and Decree of the Hon. W. Njage, Senior Principal Magistrate, delivered on 8 November 2007 in Eldoret CMCC No. 861 of 2006)

JUDGMENT

[1] The Appellants herein, **Abdalla Issa** and **Emkay Construction Company Limited**, were the Respondents in **Eldoret CMCC No. 861 of 2006**. They had been sued by the Respondents, **Leonida M. Alusa** and **Mohammed L. Ilondanga**, in respect of a road traffic accident that took place on **8 September 2004** at around 7.30 p.m. along the Eldoret-Turbo Road. It was the contention of the Respondents before the lower court that the 1st Appellant so negligently managed and/or controlled the 2nd Appellant's motor vehicle **Registration Number KAG 821R, Leyland Lorry**, that he caused it to violently collide and/or crash with motor vehicle **Registration Number KAE 628T, Nissan Matatu**, thereby occasioning fatal injuries to **Adriano Muhanji Likuyani (the Deceased)**. The deceased was then lawfully driving **Motor Vehicle Reg. No. KAE 628T**.

[2] Accordingly, the Respondent filed **CMCC No. 861 of 2006** claiming Special Damages of **Kshs. 70,390/=**; General Damages under the **Law Reform Act, Chapter 26** of the **Laws of Kenya**, the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya** as well as costs and interest. The record of the proceedings of the lower court shows, at page 28 thereof, that on the **22 February 2007**, liability was settled by consent thus:

"By consent of the parties, judgment on liability be and is hereby entered in favour of the plaintiff against the Defendant at 80%. The deceased to bear 20% contribution. The court to assess quantum of special and general damages."

[3] Thereafter, on the **22 May 2007** another consent order was made at the instance of the parties in the following terms:

"By consent of the parties herein, Judgment be and is hereby entered on the following heads of damages namely:-

a) Damages for loss of expectation of life Kshs. 100,000 less 20% contribution leaving a balance of Kshs. 80,000/=.

b) Damages for pain and suffering Kshs. 15,000/= less 20% contribution leaving Kshs. 12,000/=.

c) For purposes of determination of damages under the Fatal Accidents Act - (loss of dependency) a dependency ratio of two thirds be adopted. The court to determine the multiplier and assess the damages for loss of dependency.

d) Special damages and any other head of damages to be determined by court."

[4] The suit was thereafter fixed for assessment of damages on two limbs, being Special Damages and Loss of Dependency. To that end, the Plaintiff testified on **26 June 2007** as **PW2** and called one other witness, namely, **John Njoroge Kanyiri (PW1)** who was the employer of the deceased at the material time. The Defence opted to adduce no evidence. After considering the evidence presented before him as well as the written submissions filed by Learned Counsel for the parties, the Learned Trial entered Judgment for the Respondents against the Appellants in the sum of **Kshs. 845,784/=** (together with interest and costs) made up as follows:

[a] Pain and suffering - Kshs. 12,000/=

[b] Loss of expectation of life - Kshs. 80,000/=

[c] Loss of dependency - Kshs. 649,344/=

[d] Loss of consortium - Kshs. 80,000/=

[e] Funeral expenses - Kshs. 8,000/=

[f] Special damages - Kshs. 16,440/=

[5] Being aggrieved by the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal on **6 December 2007**, on the following grounds:

[a] That the Learned Magistrate erred in law and fact in awarding damages for loss of consortium to the Respondents;

[b] That the Learned Magistrate erred in fact and in law in failing to find that the 1st Respondent was not entitled to damages for loss of consortium;

[c] That the Learned Magistrate erred in fact and in law in failing to find that the 1st Respondent is not one of the persons recognized in law as being entitled to damages for loss of consortium.

Accordingly, the Appellants prayed that the appeal be allowed and the award on damages under loss of consortium be set aside and be substituted with an order dismissing this aspect of the claim. The Appellants also prayed for costs of the appeal and any further or other relief the Court may deem fit to grant.

[6] The appeal was canvassed by way of written submissions, which were filed herein on **29 November 2017** and **16 July 2018**, respectively. In their written submissions, the Appellants contended that there is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. That the **Law Reform Act** and the **Fatal Accidents Act**, which are the two statutes which govern the award of damages in fatal accident claims, recognize only three heads of general damages, namely, pain and suffering, loss of expectation of life and loss of dependency. According to Learned Counsel for the Appellant, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident, in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had, as a result, been diminished. Reliance was placed on the case of **Best vs. Samuel Fox and Co. Ltd ALLER 394; Texcal House Service Station vs. Jappinen [1999] 2 EA** and **Innocent Keti Makaya Denge vs. Peter Kipkore Cheserek & Another [2015] eKLR**.

[7] Counsel for the Respondent, on the other hand, was of the view that loss of consortium is a type of harm that falls under the category of general damages for which money is only a rough substitute; and that having shown that she is the widow of the deceased, the 1st Respondent is entitled to damages for having lost the companionship, love and affection of the deceased. Counsel relied on **Kericho HCCC No. 85 of 2000: Ruth Chepngeno Mutai vs. Patrick Wajero Oloo & Another; P B S & Another vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] eKLR; Paul Kioko vs. Samuel G. Karinga & 2 Others [2012] eKLR; F M M & Another vs. Joseph Njuguna Kuria & Another [2016] eKLR; Rose Adisa Odari vs. Wilberforce Egesa Magoba [2009] eKLR** and **Eldoret HCCC No. 183 of 2011: Micah Nyolei & Stanley Kiplagat Milgo vs. Bonventure Anthony Okumu & Another**, in urging the Court to find that the lower court did not err at all in awarding the 1st Respondent **Kshs. 80,000/=** for loss of consortium. Counsel thus urged for the dismissal of this appeal with costs.

[8] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, it was held thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

[9] Since the appeal only challenges the award on loss of consortium, it goes without saying that the issue of special damages awarded, the

multiplier and the assessment of damages for loss of dependency are not in dispute. With the foregoing in mind, I have keenly perused the record of the lower court and noted that, in the **Plaint** dated **5 October 2006**, it was pleaded that the deceased was, prior to his death a man in good health aged 45 years; and that by reason of his death, his estate had suffered loss of dependency and lost years. In addition, the 1st Plaintiff claimed damages for loss of consortium.

[10] In support of the claim, the 1st Plaintiff, testified that she was married to the deceased during his lifetime and that they had 7 children together. It was her uncontroverted evidence that she was 45 year old as at the time she gave her evidence; and added that she had not re-married and had no intention of doing so. Going in the footsteps of **Hon. Visram, J.** (as he then was) in **Ruth Chepngeno vs. Patrick Oloo & Another** (supra), the Learned Trial Magistrate held that:

"...In line with Ruth Chepngeno cited above, Hon. Justice Alnashir Visram awarded the plaintiff an award of Kshs. 100,000/= for loss of consortium. Taking into account the cited authorities and the circumstances of the plaintiff, I believe I can and do award the plaintiff Kshs. 100,000/= as general damages for loss of consortium. I will further discount this by 20% liability to leave a balance of Kshs. 80,000/=..."

[11] I have considered the submissions made by Learned Counsel on this point and note that their rival arguments are indeed supported by the authorities they relied on. For instance, in **Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another [2015] eKLR**, **Hon. Githua, J.** was of the view that:

"With respect to the award of KShs. 150,000/- for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. The Law Reform Act and the Fatal Accidents Act which are the two statutes which govern the award of damages in fatal accident claims recognize only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency.

In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own.

In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside..."

[12] However, in the **Ruth chepngeno Mutai Case** (supra), **Hon. Visram, J.** was of the view that:

"As a result of the death of the Deceased, the Plaintiff lost a husband. She told this court that she had no intention to remarry. Taking into account the cited authorities and the circumstances of the Plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium."

[13] Similarly, in **Paul Kioko vs. Samuel G. Karinga & 2 Others [2012] eKLR**, Kshs. 100,000/= was awarded to a widower for loss of consortium and servitium; while in **Rose Adisa Odari vs. Wilberforce Egesa Magoba [2009] eKLR**, an award of Kshs. 50,000/= was made to the widow for loss of consortium in a case where the deceased was aged 35 years at the time of his death. The Respondent also cited the case of **Micah Nyolei & Stanley Kiplagat Milgo vs. Bonventure Anthony Okumu & Another**, in which Kshs. 200,000/= was awarded on 22 July 2016 for loss of consortium by the High Court at Eldoret (**Hon. Ngenye-Macharia, J.**); and **P B S & Another vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] eKLR**, in which the Plaintiff was awarded Kshs. 800,000/= for loss of consortium by **Hon. Aburili, J.** on 6 June 2016.

[14] Clearly therefore, there is sound basis for the claim and award of damages for loss of consortium in fatal accident matters. Indeed, in the Court of Appeal case of **Salvadore De Luca vs. Abdullahi Hemedi Khalil & Another [1994] eKLR**, it was held that:

"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."

[15] That award was made on 27 January 1994. I did not hear the Appellant to be saying that the amount awarded to the Respondent herein for loss of consortium by the lower court was inordinately high as to warrant my interference. In any case, assessment of damages is a matter of discretion; and ordinarily, an appellate court will not disturb an award unless sufficient cause be shown. This is why, in **Hellen Waruguru Waweru (Suung as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** (supra), the Court of Appeal held that:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[16] Hence, for the foregoing reasons, I would uphold the Judgment of the lower court dated **8 November 2007** and the Decree ensuing therefrom, and would accordingly dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY 2019

OLGA SEWE

JUDGE