



Francis Munuve & George Mwendwa (The Administrators Of The Estate Of Kivwana Munuve) v Manufacturers And Suppliers Ltd & another (Civil Case 327 of 2014) [2022] KEHC 11861 (KLR) (Civ) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11861 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 327 OF 2014
DO CHEPKWONY, J
JULY 22, 2022

BETWEEN

FRANCIS MUNUVE & GEORGE MWENDWA (THE ADMINISTRATORS OF THE ESTATE OF KIVWANA MUNUVE) PLAINTIFF

AND

MANUFACTURERS AND SUPPLIERS LTD 1ST DEFENDANT

JUBILEE INSURANCE COMPANY LTD 2ND DEFENDANT

JUDGMENT

1. This claim was commenced through an undated Complaint filed on 15th October, 2014 by the Plaintiffs as the Legal Representatives of the Estate of the deceased, Kivwana Munuve. The claim has been filed under the provisions of the *Fatal Accidents Act* and under the provisions of the *Law Reform Act*.
2. In the Complaint, it is alleged that the deceased was the 1st Defendant's employee and at the time of his death on 16th February 2012 he was working in the store. That the deceased was arranging grinding discs, the Plaintiff slipped on a slippery floor and fell and was crushed to death by the falling grinding discs due to the negligence, carelessness and/or recklessness on the part of the 1st Defendant. The particulars of negligence on part of the 1st Defendant were that the 1st Defendant failed to take adequate precautions for the safety of the deceased while at work, exposed the deceased to the risk of damage or injury which he knew or ought to have known, failed to ensure safe working place, and lastly failed to provide and maintain proper system of work or instruct their workers on how to follow the system. Further, the Plaintiffs plead the doctrine of Res Ipsa Loquitur and have sought this court to award damages under the *Law Reform Act* and the *Fatal Accidents Act* to the tune of Kshs.11,953,056.00, special damages for Kshs.200,000/= and costs of the suit.



3. The Defendants jointly filed a statement of defence on the 17th December 2014 but amended the same with the leave of the court on 25th June, 2015 wherein he denied the Plaintiff's case in toto. It is contended that the Defendant had discharged the statutory and common law obligations by supplying the deceased with the relevant safety appliances and he suffered the fatal accident due to his negligence and carelessness. The particulars of negligence on part of the deceased were pleaded under paragraphs 7 and 8 of the amended defence. Further, the Defendants have alleged that the deceased was aware of the risks and dangers inherent in the nature of work he was assigned, and had voluntarily accepted the same. Finally, the Defendant has pleaded that they had paid the estate of the deceased a total of Kshs.6,914,350/= broken down as follows, Kshs.150,000/= as funeral expenses, Kshs.13,000/= as post-mortem fees, Kshs.798,294/= as severance pay and Kshs.5,953,056/= as payments under WIBA, they have then sought that the said amount to be set off against any award that may be made to the Plaintiffs. Nonetheless, the Defendants have craved for this claim to be dismissed with costs.
4. In the reply to the amended defence and set off dated 8th July, 2015 and filed by the Plaintiffs on 9th July, 2015, the allegations that the deceased was negligent were rebutted and it is reiterated that the duty is on the employer to ensure safety of its employees but not on the employees. The Plaintiffs have also acknowledged that the Defendants made the payment of Kshs.6,914,315/= save for that the amount received was actually different.

Evidence on hearing

5. The matter was then slotted for hearing and on 27th July, 2021 whereby both the Plaintiffs' and Defendants' witnesses testified. Francis Munuve, was the sole witness for the Plaintiff's and he testified as PW1. He adopted his witness statement dated 18th February, 2012 as his evidence in chief and produced the list of bundle of documents dated 15th October, 2014 as Plaintiff Exhibit 1(PEXh P1). In that statement he avers that the deceased was his father and he had worked for the Defendant since 1979 to time of his death. On 16th February, 2012, he was informed by his father's co-worker that his father had become unconscious after grinding discs that had fallen on him. Since he was in Nakuru, he called his brother who was in Nairobi to go and check what had transpired. He also boarded a vehicle and proceeded to the scene. PW1 went on to state that on his way, his brother called to inform him that the deceased had succumbed to the injuries. That later, when he arrived at the scene, he found his father lying dead within the store where he was working. He added that the father was earning salary of Kshs.62,011/= per month.
6. On cross examination, PW1 conceded that he was not at the scene when the accident occurred and therefore could not explain how the same had occurred. He confirmed that they received the payments from the 2nd Defendant insurance company for Kshs.5,953,056/= as compensation for loss of dependency, Kshs.150,000/- from the Defendant as burial expenses although he averred that that was not enough, Kshs.13,000/= was as well paid as expenses for Autopsy and Kshs.798,294/= as severance pay by the 1st Defendant. Further, PW1 confirmed that the deceased died at the age of 54 years and was survived by three(3) children who were adults, One (1) minor child and his mother. Although he averred that all the three adult children were dependant on the deceased, he has no evidence to establish that. Lastly, he reiterated that when he got to the scene he did not see the deceased wearing any protective gadget. He stated that the basis of filing the present suit was to recover damages for pain and suffering and loss of expectation for life.
7. On re-examination, PW1 reiterated that the deceased was earning a salary of Kshs.62,011/= per month and there was a pays lip to that effect exhibited in the Plaintiff's bundle of documents. He was adamant that there were no documents to show when the deceased was to retire and, in that effect, the normal retirement age is 60 yrs.



8. Mansoor Rajvan testified as DW1 and was the sole witness for the defence. Similarly, in his evidence in chief, he adopted his witness statement dated 12th January, 2015 where he had contended that the deceased was in charge of the store and responsible for the issuance of protective gear to himself and the juniors working under him, and in that respect, he had been supplied with a dust coat, dust mask, industrial shoes and ear mufflers which he had signed for. He added that the deceased was responsible for arranging the grinding discs safely hence it was in his carelessness that the discs fell on him. Similarly, DW1 stated that on that fateful day he was not present at the scene of accident but only received a call that the deceased had been injured and when he got there, he found that he had succumbed to the injuries. Besides, DW1 stated that the payments already said to have been made and added that the 1st Defendant had also hired a 25-seater coach to facilitate the burial exercise. Finally, he testified that the deceased was earning a monthly basic salary of Kshs.57,021/= at the time of his death but not Kshs.62,011/= as alleged. He averred that the difference was on payment of overtime which would vary from time to time.
9. On cross-examination, DW1 conceded that the deceased had not been provided with a helmet for which PW1 thought was not required for the type of work the deceased performed. However, DW1 did not dispute that the cause of the deceased death was head and spinal injuries.

Submissions

10. On 13th October, 2021, parties directions to sum up their respective cases and the record confirms that both parties filed their respective submissions in support of their claims.
11. For the Plaintiff, the submissions are dated 16th September, 2021 and the main issue for determination as pointed therein is whether the Plaintiff should be awarded the damages sought. Under the head of pain and suffering, the Plaintiffs have submitted the deceased died while being taken to hospital and given the injuries he sustained, to wit, deformed head with obvious fractures with brain materials oozing through the ears, abrasion left side of the neck, and spinal column fracture, the court should award Kshs.1,000,000/= since the deceased suffered prolonged excruciating pain before his demise.
12. On compensation for loss of expectation for life and dependency, the Plaintiffs urged the court to adopt a multiplicand of Kshs.62,330/= being the salary he earned, a multiplier of 6 years taking into account that the deceased would retire at the age of 60 years and dependency ratio of $\frac{2}{3}$ given that the deceased was survived by his wife, two daughters aged 29 years and 14 years respectively and two sons aged 26 years and 25 years. The submissions are supported with excerpts from the case of Lucy Wambui Kihoro (Suing as the personal representative of Deceased, Douglas Kinyua Wambui) -vs- Elizabeth Njeri Obuong [2015] eKLR.
13. Lastly, the Plaintiffs relied on the provisions of Sections 34(2) of the [Work Injury Benefits Act](#) to submit that the sum of Kshs.5,953,056/= paid by the 2nd Defendant should be treated as damages awardable under the [Work Injury Benefits Act](#) in addition to damages awardable in a claim for pain and suffering and loss of expectation for life thus it ought not to be set off.
14. For the Defendants, their submissions are dated 8th March, 2022. It is argued that the Plaintiff had neither established liability against the Defendants nor were the particulars of negligence pleaded proved. Instead the Defendants submit that there was a work policy that the grinding discs should not be stacked past the height of a person hence the Plaintiff seems to have contravened the policy thus causing them to fall on his head. In any case, the court is asked to apportion liability in the ratio of 90% as against the deceased and 10% against the Defendant, if at all it shall be persuaded liability was established.



15. On quantum of damages, the Defendants asked the court to award Kshs.10,000/= for pain and suffering and Kshs.100,000/= for loss of dependency. This view is supported with excerpts from the cases of Mercy Muriuki & Another -vs- Samuel Mwangi Nduati & Another [2019] eKLR and David Kimilu Mutinda -vs- Masinde Wamela Samuel [2021] eKLR where the two courts awarded Kshs.10,000/= for pain and suffering in case of the instant death and Kshs.100,000/=for loss of expectation for life.
16. For loss of dependency, the Defendants submitted that the deceased died at the age of 54 years hence, had only one (1) year to the age of retirement. Thus, the court was urged to adopt the multiplier of one (1) year. The court has further been urged to adopt the ratio of $\frac{1}{3}$ as was held in the case of Martha Muthoni Ndage (Appealing as the legal representative of Stanley Ndege Gichuki (Deceased) -vs- Anthony Kamau Kambiriri [2019] eKLR, that where some of the dependants are adults, the ratio of $\frac{1}{3}$ would be suitable. Lastly, the Defendants urged the court to follow the precedents laid in the cases of Eunice Adoyo Onyango -vs- East African Growers Limited [2017] eKLR and the case of John Barasa Wasike & Another -vs-Devki Steel Mill Ltd [2013] eKLR where the courts deducted the amounts paid under the *Work Injury Benefits Act* from the General damages. In short, the Defendants submit that the Plaintiffs have not established a case higher than what they were paid and sought the court to dismiss the claim.

Analysis and Determination

17. I have considered the Plaintiffs' case, the defence advanced by the Defendants, the respective written submissions and the cited statute and case law relied on by both sides. The issues identified for determination are as follows:-
 - a. Whether the Plaintiffs' have established liability against the Defendants, if so
 - b. What damages are awardable to the Plaintiffs under the *Law Reform Act* and the *Fatal Accidents Act*, and
 - c. Whether the amounts already paid to the Plaintiffs should be set off against the award which may be made in this case Whether the Plaintiffs have established liability against the Defendants
18. In light of the evidence presented before the court, it is uncontroverted that the deceased was injured while working at the 1st Defendant's Company premises and succumbed to the injuries he sustained. It is clear that none of the witnesses who testified were present at the scene when the accident occurred but a common theory in all testimonies and pleadings presented to court, was that the deceased was arranging grinding discs when he slipped on a slippery floor whereby the discs fell on him, hence the fatal accident. The Plaintiffs on their side submitted that the 1st Defendant was negligent by failing to provide protective gear such as helmet to its workers, the deceased included and ensuring the environment for work was safe. The Plaintiffs went on to submit that had the 1st Defendant provided the deceased with a helmet as he is enjoined by law to do, the injuries would not have been as worse as they were.
19. The record through the evidence of DW1 shows that the 1st Defendant had not provided the deceased with a helmet. The postmortem report in the Plaintiffs' bundle of documents also show that the deceased died as a result of Head and Spinal Injury due to blunt trauma.
20. This court has for the umpteenth time reiterated that an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk.



So that, even if the job under question happens to be inherently dangerous and the employees accept to do such a job as the Respondents herein submitted, the same does not excuse or exonerate an employer from ensuring the existence of minimum reasonable measures of protection for the employees.

21. In this particular case, it has not been rebutted that the floor in the store where the deceased was working was slippery and exposed the workers to the risk of sliding and falling down. Similarly, when the 1st Defendant tasked the deceased with the duty of arranging the grinding discs in the store, points to the expectation of its knowledge and awareness that there was likelihood of the stacks falling someday, thus it cannot be gain-said that a helmet is a necessary protective device in such an environment. Nonetheless, the 1st Defendant's duty to the deceased remains the same, that is, to take reasonable care by providing and maintaining a safe working environment and providing him with sufficient protective tools for his use and generally to take adequate measures which would ensure the safety in the discharge of its employees' duties.
22. DW1 conceded to not providing the deceased with sufficient protective gear and more specifically a helmet, and in my view, this is sufficient proof of an employer's breach of duty. It is therefore my finding that the Plaintiffs have properly proved negligence to the required standard of balance of probabilities. The submission by the Defendant that the deceased was the only person accessing the store where the accident occurred does not negate the employers duty to ensure a safe working environment or the duty to provide protective gadget for its employees. I therefore find no ground of apportioning liability against the Deceased. The 1st Defendant must be held to be wholly responsible for the negligence which resulted in the death of the deceased, and proceeded to hold that the 1st Defendant 100% liable for the accident, a result of which he deceased met his death.

Damages awardable to the Plaintiffs under the [Law Reform Act](#) and the [Fatal Accidents Act](#)

23. Having made a finding on liability, attention is turned to whether the damages can now be awarded under the provisions of the [Fatal Accidents Act](#) as well as the [Law Reform Act](#). As regards the damages under the [Fatal Accidents Act](#), I do note from the evidence presented and more particularly the death certificate which shows that the deceased was aged 54 years at the time of his demise. From the status of the payslip attached, he was receiving a basic pay of Kshs.49,583/=, overtime pay which was fluctuating on monthly basis and house allowance of 7,438/=. In my considered view, overtime payments cannot form part of the income for purposes of computing lost income under the [Fatal Accidents Act](#).
24. Under Section 4 of the [Fatal Accidents Act](#), Cap 32 laws of Kenya, the action is brought for the benefit of the family/Estate of the deceased. Therefore, once a person dies, his estate cannot enjoy benefits that were personally enjoyed by the deceased such as overtime, commissions, travel allowances and house allowance. To that extend, the only financial loss suffered by the dependents is the basic salary less the taxes, and in the present case, the deceased was earning basic of Kshs.49,583.00. The deceased's payslip for the month of January, 2012 shows that the taxes he was paying were Kshs.2,571/= as P.A.Y.E, Kshs.200/= as N.S.S.F and, Kshs.320/= N.H.I.F leaving a net pay of Kshs.46,492/=. This is the amount that would be adopted had the Defendant not urged the court to adopt a sum of Kshs.57,021/= for purposes of calculations on loss of dependency. This court shall therefore adopts the multiplicand of Kshs.57,021/=.
25. The parties have also contested the age that the deceased would have retired. The Defendants state that the deceased having been 54 years old at the time of his demise, that he was one (1) year from retirement, that is basing the retirement aft to 55 years yet the same is not supported by any evidence while the Plaintiffs suggest the retirement age of 60 years. In my view, since the payslip does not state the age, the deceased was expected to retire, this court will shall adopt the mandatory retirement age of 60 years set for civil servants. Consequently, the court adopts a multiplier of 6 years.



26. Finally on ratio, the Defendants sought the court to adopt the ratio of $\frac{1}{3}$ given that some of the dependants were adults and the deceased should be deemed to have been survived by only one daughter and the wife. On the other hand, the Plaintiffs suggested the ratio of $\frac{2}{3}$. Although it is undeniable that some of the deceased's dependants herein were adults at the time of his death and have not provided prove of their dependency, this court find that it has not been controverted that the deceased had a minor daughter aged fourteen (14) years, who together with the deceased's wife are presumed in law to be fully depended on the deceased. For this reason, I do find that the $\frac{2}{3}$ dependency ratio as reasonable in the circumstances. Thus, the loss of dependency under the *Fatal Accidents Act* would then in the present case be worked as follows:

$$\text{Kshs.}57,021 \times 12 \times 6 \times \frac{2}{3} = \text{Kshs.}2,737,008/=$$

27. Under the *Law Reform Act*, the Plaintiffs proposed a sum of Kshs.1,000,000/= for pain and suffering and Kshs.5,000,000/= under Loss of expectation of life. Those suggestions were never supported by an evidence, Legal provision or even a single decided case to that extend.

28. On the other hand, the Defendants proposed the sum of Kshs.10,000/= for pain and suffering and Kshs.100,000/= under Loss of expectation of life and supported the same with reliance on the case of Martha Muthoni Ndage (Appealing as the legal representative of Stanley Ndege Gichuki (Deceased) -vs- Anthony Kamau Kambiriri [2019] eKLR.

29. I have considered the propositions by both parties and the extend of suffering the deceased might have suffered. The injuries indicated in the postmortem report and the Autopsy report are not rebutted. Having considered the same, an award for Kshs.20,000/= for pain and suffering is adopted. As for loss of expectation of life, I have considered that the deceased was about six (6) years to his retirement and find that the award of Kshs.100,000/= would be reasonable in the circumstances for that.

30. Lastly, as regards special damages, the Plaintiffs have sought to be awarded Kshs.200,000/= broken down into Kshs.166,550/= as funeral expenses, Kshs.200/= for police abstract, Kshs.250/= for obtaining death certificate, Kshs.20,000/= for obtaining letters of administration and then Kshs.13,000/= for the Autopsy report.

31. As is trite in law, special damages ought not only be specifically pleaded, but also specifically and strictly prove. They connote out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of being substantially exact to calculation. I have considered the receipts forming part of the Plaintiffs' bundle of documents produced as prove for the special damages. They add upto a total amount of Kshs.200,000/- and their production has not been contested. Therefore, I am satisfied that the sum of special damages has been proved as claimed in the required standard.

32. However, the Plaintiffs were agreeable that they received Kshs.150,000/= to cater for funeral expenses and Kshs.13,000/= for Autopsy expenses. As stated above, Special damages imply out of pockets expenses and the sum of Kshs.163,000/= paid by the Defendants cannot be refunded to the Plaintiffs, hence the same is deducted from the claimed sum of Kshs.200,000/= leaving a balance of Kshs.37,000/= as the specifically proved special damages.

33. In summary the awards of this court in both general damages (under the *Law Reform Act* and Fatal Accidents Acts) and special damages are as follows:

- a. Special damagesKshs.37,000.00
- b. Loss of dependencyKshs.100,000.00
- c. Pain and sufferingKshs.20,000.00



d. Loss of expectation of lifeKshs.2,737,008.00

Total Kshs.2,894,008/=

34. That notwithstanding, the Defendants have sought to have the award to be made to the Plaintiff to be set-off against Kshs.5,953,056/= already paid to the Plaintiffs under the Workman's Compensation Act. The Plaintiffs do not dispute having been paid the sum of Kshs.5,953,056/= but urge the court to be guided by the provisions of Section 34(2) of the Work Injury Benefits Act and treat the former award as an additional to the award to be made in this case.
35. I have considered the said section and, in my view, it only preclude deductions on the amounts awarded under the said Act but does not vouch for double compensation of the deceased's estate. I therefore subscribe to the view that once the deceased's estate has been compensated under the Work Injury Benefits Act, the estate should not be compensated again under the Law Reform Act or the Fatal Accidents Act unless it is shown that the former award is insufficient or lower than the award to be awarded to the deceased's estate under the Law Reform Act or the Fatal Accidents Act. In such case, the deceased's estate shall only be awarded the difference thereof.
36. Consequently, it is my finding that the Plaintiffs herein were sufficiently compensated under the Work Injury Benefits Act and would have been entitled to a further award had this court reached a higher award under both Law Reform Act and the Fatal Accidents Act. For that reason, I proceed to dismiss the Plaintiffs' claim herein but with no orders as to costs. Each party shall bear its own costs.

It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22nd DAY OF JULY , 2022.

D. O. CHEPKWONY

JUDGE

In the presence of;

Mr. Eslaba counsel holding brief for Mr. Nyambo for Plaintiff

Court Assistant - Kevin

