



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 37 OF 2018

VOLCAN HOLDINGS LIMITED.....APPELLANT

VERSUS

JOSEPH MUSABASI BIRARO (*Suing as administrator of the estate of*

ROBINSON WAKHISI MUSABASI [DCD]).....RESPONDENT

JUDGMENT.

Joseph Musabasi Biraro was the father of the deceased Robinson Wakhisi who died in a road traffic accident while travelling as a fare paying passenger in motor vehicle KCC 045V which was involved in an accident with motor vehicle Reg. No. KBV 593C hauling trailer No. ZE 2548 along Webuye Bungoma road whereupon the deceased sustained serious injuries from which he died. The plaintiff filed this suit as the administrator of the estate of the deceased Robinson Wakhisi Musabasi. The plaintiff prayed for damages under the Land Reform Act and Fatal; Accident Act.

The Defendant/Appellant filed Amended Statement of defence denying the claim and any negligence and blamed the driver or motor vehicle Reg. No. KCC 045V Toyota matatu for the accident and averred that it will seek leave to enjoin the owner of Motor vehicle KCC 045V in the proceedings.

On 12.4.2018 by consent Judgment on liability was apportioned at 80% to be born by the defendant and 20% by the plaintiff.

The only issue that went for trial is the assessment of damages. Pw1 Joseph Musabasi Biraro testified that the deceased was aged 23 years and at time of death was a student at Kisiwa Youth Polytechnic. He had a daughter Ashiling Nabangala. The defence did not call any evidence.

By Judgment dated 6.7.2018 the learned trial magistrate rendered himself this;

I have fully considered the evidence tendered in this case. I have also fully considered the wise authorities cited in this case. I have also noted that the deceased was aged 23 years and that he already had dependants and more particularly his daughter who would be expected to be dependant on the deceased even if he had not gotten employment.

In view of this I will find that award shall be made on a Multiplier and Multiplicant but we are to adopt the minimum wages of Kshs.12,000/= as the deceased monthly income. Judgment shall therefore be entered for the Plaintiff against the defendant as follows;

Pain and Suffering* *Kshs.40,000/=

Loss of Dependency* *Kshs.12,000 x 12 x 37 x 2/3 =Kshs.5,328,000/=

Special Damages* *Kshs.90,000/=

Costs of this suit less 20%

Aggrieved by the assessment of damages the appellant filed this appeal on the following grounds;

1. **THAT** the learned trial Magistrate erred in law and fact in applying the wrong principles in assessing damages for loss of dependency thereby arriving at a grossly overstated assessment as to amount to a gross over estimation of the award of damages under this head.

2. **THAT** the learned trial Magistrate erred in and fact in relying on a purported income of Kshs.12,000/= to assess general damages for loss of dependency when the deceased was a student thereby ending up awarding damages that were grossly overstated in the circumstances of the case.

By Consent this appeal was canvassed by way of written submissions. Both parties filed their respective submissions. Counsel for the appellant Mr. Manani submitted that the trial magistrate erred in awarding damages on quantum on loss of dependency. Counsel submits that the deceased being a student, and not employee the trial court should have been guided by a global approach for assessment instead of the multiplier method.

Counsel submitted that the only evidence available was that (a) the deceased was aged 23 years (b) had a daughter (c) he was a student at Kisiwa Youth Polytechnic although the court he was studying is not indicated.

He submits that since he was a student there is no evidence of earning and how much of it he was using to support the dependant. Counsel submitted;

1. Therefore, apparently the trial court misdirected itself in using a multiplicand of Kshs.12,000/= and two thirds multiplier. The Appellant submits that the amount and dependency principle had no basis. It is impossible to tell what the deceased would have earned, what age he would have retired and how much he would give his dependant. The award in this heading was speculative and unreasonable. In sum, it is not clear how the trial magistrate used the multiplier method without engaging in fanciful speculations hence arriving at an erroneous amount which the Appellant beseech this court to interfere with.

Counsel submits that global award of Kshs.700,000/= would be adequate compensation. He relied on the persuasive decision of the High Court in **Chebadiya Enterprises Ltd -Vs- Sara Alucha Mlwasi (Suing as the legal Administrator of the estate of Faiza Musa) 2018 eLKR.**

Mr. Mukisu for the Respondent submitted that it is now a well settled principle of law that an appellate court should not interfere with the discretion of the trial court on assessment of damages unless it has been shown that the trial court applied wrong principles; took into account irrelevant issues or did not consider relevant issues or that the award is so inordinately high or inordinately low as to amount to an erroneous estimate of damages

General damages are awarded to compensate the plaintiff in monetary terms for the loss and damages suffered by the plaintiff. Where the Plaintiff is the estate of the deceased person, the damages are classified under three heads, pain and suffering, loss of expectation of life and loss of dependency. Damages for pain and suffering and loss of expectation of life are claimed for and awarded under the Law Reform Act. Generally nominal damages are awarded under this head. Where the pain and suffering was for a short period, lesser sums are awarded. However, where pain and suffering was endured for prolonged period the amount would be higher. Damages for loss of expectation of life are not pegged on financial losses but the loss of capacity of enjoying life which had been taken away. In **Benham Vs. Gambeling 1941 AC 157** the court states;

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective and the right sum to award, depends on the objective assessment on what kind of future on earth the victim might have enjoyed, whether he had rightly estimated that future or not of course no regard must be heard on financial loss or gains during the period of which the victim has been deprived. The damages are in respect of loss of life not loss of future pecuniary prospects.

Compensation for loss of dependency are awarded under the Fatal Accidents Act. This is sum the dependants would have received from the deceased or the deceased would have spent on the dependants for a period of working life. This is loss of future pecuniary prospects. To assess damages under this head, the court adopts any one of the two methodologies (1) Global sum (2) Determine the expected deceased income. To assess damages under this head, the court will determine the deceased income, the multiplicand, the number of years he would have worked, the multiplier and the dependency ratio.

These principles were restated by Ringera J in **Beatrice Wangui Thairu Vs. Hon. Ezekiel Bargentuny & Another NBI HCC 1638** as follows:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earning of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure usually called the Multiplier, the court must bear in mind the expectation of earning life of the deceased; the expectation of life and dependency of the dependants. The sum arrived at must be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum, and would if wisely invested yield returns of an income nature.”

In assessing damages under the fatal accidents Act, the court after determining the net earning i.e. gross earning less tax obligation, it would then multiply the sum by a reasonable figure representing so many years the deceased would have worked bearing in mind the expectation of earning life of the deceased and also the vicissitudes of life.

Where the multiplicand and multiplier approach can not be applied either because the deceased is beyond retirement age or is a minor who is not earning anything then courts awards a global sum as damages for loss of dependency.

The trial magistrate, liability having been apportioned, adopted the multiplier approach. The appellant faults this approach on the grounds that the deceased being then a student, it would not be possible to know his earning and that the use of the approach was speculative.

The deceased in the cause was aged 23 years old, was a student at Polytechnic and a clearly was not employed. Where a deceased is an adult and is not employed or his earning is not known, then the court can adopt the gazzetted the minimum wage for unskilled or skilled workers as the baseline earning of the deceased.

This court being an appellate court recognizes that the assessment of damages is within the discretion of the trial magistrate. The court would normally not interfere with the discretion unless it is shown that (a) the trial court acted on wrong principles or (b) that it took into consideration matters which it ought not to have taken into consideration or left out matters it ought to have considered or (c) that the damages are so low or so high as to reflect a wrong estimate of the damage or loss.

In this case the trial court elected to use the multiplier/multiplicand approach or instead of the global approach to the assessment of damages. The deceased having being an adult aged 23 years, the trial magistrate cannot be faulted for using the multiplier multiplicand approach. The trial magistrate did not proceed on wrong principle because he chose to adopt the multiplier approach and then choosing the minimum wage as per Legal Notice No. 111 of 10.7.2017 which provided for minimum wage from 1.5.2017 for general labourer including cleaner sweeper house servant, day watchman to be Kshs.11,926.40 [rounding up to 12,000/=] and took account of the retirement age of 60 years as the multiplicand and 37 years as multiplier.

I therefore find no merit in this appeal which is hereby dismissed with costs.

Dated and Delivered at Bungoma this 26th day of January, 2021

S.N. RIECHI

JUDGE