



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 36 OF 2018

VOLCAN HOLDINGS LTD.....APPELLANT

VERSUS

MOURINE NASIMIYU & ALICE NASIMIYU MURUTU

(Suing as Administrator of the estate of

ARNEST WASIKE SINDANI (Deceased))....RESPONDENT

(Arising from the judgement and Decree of Hon. C.A.S Mutai PM in Bungoma CMCC No. 291/2017 delivered on 28/9/2018)

JUDGEMENT

The plaintiffs (respondents herein) instituted suit claiming General damages, special Damages, costs and interest as a result of an accident which occurred on 4/6/2017 at Sikata Area involving the appellant's Motor Vehicle Registration Number KBV 593C hauling Trailer Registration Number ZE 2548 and the deceased's Motor Vehicle Registration Number KCC 045V. The deceased sustained injuries and later succumbed. This suit was anchored on the provisions of the Law Reform Act and the Fatal Accidents Act.

Vide an amended defence dated 3rd October, 2017, the appellant denied negligence on the part of its driver and attributed the occurrence of the accident, if any, to the negligence of the deceased and or the owner of Motor Vehicle Registration Number KCC 045V.

By consent liability was apportioned at 80:20 in favour of the plaintiff against the defendant (appellant herein).

Mourine Nasimiyu Wekesa testified as PW1. She stated that the deceased was her husband and they had 5 children. At the time of death, the deceased was a driver aged 33 years earning a salary of Kshs 20,000/= a month. The appellant did not call any witness.

The court delivered its judgement and awarded Kshs 35,000/= for pain and suffering, Kshs 2, 8080,000/= for loss of dependency and Kshs 75, 000/= for special damages.

Aggrieved by the award, the appellant appealed on the ground;

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 overestimation of the award of damages under this head.

The appellant through Mr. Manani learned counsel raised the following twin issues for determination by the court;

1. Whether the trial court erred in awarding quantum on loss of dependency.

2. Whether the appellate court can interfere with the discretion of the trial court on quantum and review it.

Whether the trial court erred in awarding quantum on loss of dependency.

Counsel submits that the figure of Kshs 2, 808, 000/= which he deems unreasonably high was arrived at erroneously using the multiplicand of Kshs 13, 500/= for 26 years and multiplier of two thirds.

That the plaintiff proved parenthood of 2 children only, failed to produce school records, failed to prove the deceased was employed and that there were not VAT receipts for anything paid for. That from the evidence on record, it is impossible to tell what the deceased earned, what he contributed to his dependents thus the award was speculative and unreasonable.

Counsel has referred the court to; *Sheikh Mushtaq Hassan Vs Nathan Mwangi Kamau Transporters & 4 Others (1986) KLR 457* and *Mwanzia Vs Ngalali Mutua and Kenya Bus Services (Msa) Limited & Anor*.

Whether the appellate court can interfere with the discretion of the trial court on quantum and review it

On this issue, counsel urges this court to set aside the award of loss of dependency and instead apply the global award of between Kshs 700,000/=. The case of *Chahadiya Enterprises Ltd & Anor V Sarah Alusa Mwachi (suing as the legal administrator and personal representative of the estate of late Faiza Musa (Deceased)(2018)eKLR* has been cited.

The respondent on his part raised the following issue for determination;

- 1. Whether the damages awarded to the respondent were excessive in the circumstances.**
- 2. Whether the learned trial magistrate applied the right principles and put into consideration the evidence on record in arriving at his decision.**
- 3. Whether this appeal is merited and whether the appellant is entitled to the prayers sought.**

On the first issue, counsel submits that the award was reasonable and proportionate with the degree of loss and should be upheld. He relied in the decision in *Easy Coach Bus Services & Anor vs Henry Charles Tsuma & Anor (suing as the administrators and personal representatives of the estate of Josephine Wenyanga Tsuma-Deceased) (2019)eKLR* where an award of Kshs 2, 843, 209/= was upheld on appeal.

On the second issue, it is submitted that the trial magistrate took into consideration the relevant factors and the award was commensurate with the loss suffered. The award was fair and should not be disturbed. Counsel submits that the appellant has not shown the principles that were not considered. The respondent has relied on the decision in *Charles Oriwo Odeyo vs Appollo Justus Andabwa (2017)eKLR*.

On the third issue, the respondent submitted that the award was made after careful consideration of all the principles of granting awards and the evidence on record. That the appeal is calculated to deprive the respondent's right to enjoy the fruits of her judgment. That the appellant has failed to demonstrate that the orders granted are inordinately high and unreasonable.

The duty of this court being a first appellate court were well stated in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR*, where it was held;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

This appeal revolves mainly on the award of damages under the head for loss of dependency. The appellant faults the trial magistrate for using a multiplicand of Kshs 13, 500/= and a multiplier of Two-Thirds. That by using the aforesaid method, the court arrived at a gross overestimation of the award.

Counsel challenges the basis on which this approach was arrived at taking into consideration that; it was impossible to tell the deceased's earnings, contribution he made to his dependants thus the award under the heading was speculative and unreasonable.

The trial court on a finding of fact held that the deceased was at the time of his death aged 33 years, survived by a widow and 6 children. That though the deceased was said to be carrying passengers between Eldoret and Bungoma earning a figure of around Kshs 20,000/= per month, no evidence was produced to prove this fact. A driving license was nevertheless produced as exhibit.

In the absence of proof of earnings, the trial magistrate sought recourse in the minimum wage regulations. This court has had occasion to ascertain from the Regulation of Wages (General) (Amendment) Order, 2017 and the salary payable to a driver of his cadre is Kshs 13, 309.80/=.

The trial magistrate must have struck a balance between PW1's assertion that the deceased earned Kshs 20,000/= and the legal provision on Minimum wage earnings thus the figure of Kshs 13, 500/=.

In arriving at the award under this heading the magistrate observed;

...there was however no evidence confirming the exact income of the deceased. That being the case, I will agree with Mr. Manani, the advocate for the defendant that where no evidence of income is furnished to court to prove this, the court must look elsewhere to ascertain the wage of the deceased. This court will have recourse to the Regulation of wages order in force at the time of death.

When faced with such a scenario where the records of earnings are wanting, Makau J. in *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) (2018) eKLR* held;

In the instant case, PW1 did not produce any document to confirm the deceased was a watchman earning KShs.10,000/= per month as a watchman. That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor are they issued with salary slips or sign payment vouchers as regards their earnings but it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind none production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings will be insisted on.

In the instant appeal, this court is satisfied that despite the failure to produce documentation demonstrating the earning capacity of the deceased, the trial magistrate's recourse in the minimum wage regulations cannot be faulted. This was a proper case where the court was entitled to look elsewhere to ascertain what the deceased could have been earning.

The basis for using a multiplicand and the multiplier approach is a well established principle in our legal system. It is mainly intended to achieve uniformity in the awards flowing from our courts where the facts of the case are such that the principle would not lead to a gross underestimation or overestimation of the award.

On whether to adopt the global award approach as opposed to the multiplier approach, the court of appeal in *Jacob Ayiga Maruja & Another –Vs- Simeane Obayo, (2005) eKLR*. Justice Ringera expressed himself as follows;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

The appellant urges the court to set aside the trial court's award on loss of dependency and expectation of life. The law on when an appellate court can interfere with the exercise of discretion are now settled and clear.

In *Butt v Khan (1977) KAR 1*, for a party to be entitled to a review of an order of a magistrate exercising discretion, he/she must establish;

that the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or, the amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

This court finds that the trial magistrate carefully considered the principles established by statute and legal authorities and the decision arrived there at resonates well with the case presented before him. This court finds no reason to interfere with the award therein.

The upshot of the above is that the appeal has no merit and is dismissed with costs to the respondent.

It is so ordered.

DATED at BUNGOMA this 20th day of May, 2021

S. N RIECHI

JUDGE