**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.2 OF 2019**

**[consolidated with civil appeal No. 5 of 2019]**

**BETWEEN**

**WEST KENYA SUGAR CO. LTD.....APPELLANT**

**AND**

**FALANTINA ADUNGOSI ODIONYI** [Suing as the legal

representative of Patrick Igwala Odionyi-deceased]**...RESPONDENT**

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No. 258 of 2017 by Hon. Maureen Odhiambo- Senior Resident Magistrate).

**JUDGMENT**

1. The appellant in Civil Appeal No.2 0f 2019, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 258 of 2017. She had sued for special and general damages in a claim that arose from a fatal road traffic accident.

2. The respondent contended that on 7th August 2015, the appellant's servant and or employee drove motor vehicle registration number KBN 435F/ ZC 8876 New Holland tractor negligently and carelessly and caused an accident and the deceased who was a passenger in the said vehicle was fatally injured.

3. After the case was heard, the learned trial magistrate awarded the respondent Kshs. 112,230 special damages and general damages of Kshs. 2,000,928. The learned trial magistrate held that the deceased contributed 20% to the accident. After factoring the contribution, the total net award was Kshs. 1,786,572/=.

4. The appellant was aggrieved by the judgment which was delivered on 7th February 2019 and filed this appeal. The appellant was represented by Onyinkwa & Company, Advocates. She raised the following grounds:

a. That the learned magistrate erred in fact and in law and fact in holding the appellant 80% liable in view of the evidence on record.

b. That the learned magistrate erred in fact and in law and fact in apportioning liability against the appellant when the evidence on record clearly indicated that the Respondent was wholly negligent.

c. That the learned magistrate erred in fact and in law and fact in adopting a dependency ratio $^{2}/_{3}$ when there are no proof of dependency availed in court.

d. That the learned magistrate erred in fact and in law and fact in adopting a multiplier of 35 years and without taking into account life's vicissitudes and vagrancies.

e. That the learned trial magistrate erred in law and fact in failing to deduct and/or take into consideration that the amount awarded under the Law Reform Act should be deducted from the amount awarded under the Fatal Accident Act.

f. That the learned magistrate erred in fact and in awarding damages that were excessive in the circumstances.

5. The respondent was represented by Omondi & Company Advocates. The appeal was opposed.

6. In the Civil appeal No. 5 of 2019 the appellant was Falantina Adungosi Odionyi. She raised two grounds of appeal as follows:

> a. That the learned trial magistrate erred in law and fact in apportioning hefty contributory negligence against the weight of the evidence before her.
>
> b. That the learned trial magistrate erred in law and fact in apportionment of liability as to amount to an erroneous exercise of judicial discretion.

7. The two appeals were consolidated by a written consent of the parties dated 8th October 2019 and filed in court on 11th October 2019. Parties agreed to have the appeal disposed of by way of written submissions. It was subsequently adopted as an order of the court on 3rd December 2019. I will therefore consider the two appeals together.

8. Both parties filed and exchanged their submissions.

9. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

10. On the material day, the deceased was a loader together with another one called Dennis Onukur (PW3). The driver of the ill-fated tractor was Geoffrey Sawala (DW1). He conceded that he caused the accident. He said that the two loaders were employees of WEST KENYA SUGAR CO. LTD, the appellant herein. He further testified that as a policy of the company, he was supposed to carry loaders. These two (PW3 and (DW1) were present during the accident.

11. From the evidence on record, the learned trial magistrate erred in apportioning liability to the deceased. The deceased was on duty as a loader and he had no option to make. The learned trial magistrate proceeded as he had any. The doctrine of *volenti non fit injuria* does not apply in this case. This position is illustrated in **Halsbury's Laws of England 3rd Edition Vol 28** Paragraph 28. It states:

> Where **the relationship of master and servant exists, the defence of *volenti non fit injuria* is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer.**

12. It was the duty of the employer to provide safe working, and travelling while on employment, conditions. The deceased did not contribute to the accident. I therefore set aside the finding of the trial learned magistrate on liability and substitute with liability of 100% being borne by, WEST KENYA SUGAR CO. LTD**,** the appellant.

13. I have been urged to find that the inappropriate multiplier of 35 years was used. At the time of his death the deceased was aged 21 years as it is indicated on the certificate of death which was produced as Plaintiff's exhibit 1. This is an area which lacks a clear-cut approach in deciding what multiplier to be adopted and what discount ought to be given. Judicial officers have relied solely on the decided cases. In the case of **Hassan vs. Nathan Mwangi Kamau Transporters & others civil appeal no.123 of 1985,** the Court of Appeal used a multiplier of 16 years where the deceased was aged 17 years. In **Alice O. Alukwe vs. Akamba Public Road Services LTD. & 3 others [2013] eKLR.** High court **(**Anyara Emukule J.) adopted a multiplier of 30 year for a plaintiff who was 24 years at the time of her death.

14. In the trial court the respondent proposed a multiplier of 35 years while the appellant proposed a multiplier of 22 to 23 years. Strictly speaking the proposal ought to have been 22 or 23 years. The respondent relied on the case of **Alice O. Alukwe vs. Akamba Public Road Services LTD. & 3 others [2013] eKLR** in making the proposal.

15. The retirement age in 1985 when the Court of Appeal decision in **Hassan vs. Nathan Mwangi Kamau Transporters &** others (supra) was made, the retirement age was 55 **years** unlike in **2013** when the decision in **Alice O. Alukwe vs. Akamba Public Road Services LTD. & 3 others (supra)** was made.

16. The appellant had sought the trial court to be guided by the case of **Alice O. Alukwe vs. Akamba Public Road Services LTD. & 3 others** [supra]. That being the case, the most appropriate multiplier ought to have been 33 years. I therefore substitute the multiplier of 35 years with that of 33 years.

17. The trial magistrate was faulted for adopting a dependency ratio $^{2}/_{3}$ when there was no proof of dependency availed in court. Evidence was adduced and supported with documentary evidence that the deceased was survived by a daughter and his mother. I therefore find that the respondent proved dependency on a balance of probabilities.

18. Though there was no documentary evidence to prove that the deceased earned Kshs.300/= per day, his co-worker Dennis Onukur (PW3) testified that they were earning Kshs.300/=. The learned trial magistrate adopted a multiplicand of Kshs.7240.95. This is the prescribed minimum wage for agricultural general labourer. I therefore find that this figure was reasonable.

19. It is trite law that where an award has been made under the Law Reform Act and Fatal Accidents Act and beneficiaries are the same, the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. The Court of Appeal in the case of **Kemfro vs. A. M. Lubia & Another [1982-1988] KAR 727** as follows:

**The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.**

In the instant case the learned trial magistrate did not appreciate this legal position.

20. From the foregoing analysis of the evidence on record, I set aside the award of the trial magistrate and substitute as follows:

a. Special damages pleaded and proved Kshs. 112, 230/=

b. Damages under Law Reform Act:

i. Pain & suffering Kshs. 20,000/=

ii. Loss of expectation of life 100,000/=

c. Damages under the Fatal Accidents Act

i. Lost years $300\times6\times4\times12\times33= 2851,200\times{}^{2}/_{3=}$ Kshs. 1,900,800

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|---|---|
| Total | Kshs. 2,133, 030 |
| Less award under Law Reform Act | Kshs. 120, 000 |
| Net award | Kshs. 2,013,030 |

21. Section 4 (1) of the Fatal Accidents Act provides:

**(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:**

**Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.**

In view of these provisions, I direct that the respondent to file the necessary application for apportionment between the two beneficiaries for consideration before the Chief Magistrate's Court.

22. This is an appeal where both parties brought issues that were legitimate. Each party has had some of the issues resolved in her favour whereas others were dismissed. This being the case, each party will meet own costs.

**DELIVERED** and **SIGNED** at **BUSIA** this **11th** day of March**, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**