



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 624 OF 2015

DEVSHIBHAI & SONS LIMITED.....APPELLANT

VERSUS

LULE KALUVE NYAMAI & CATHERINE

NTHENYA KYALO (Suing as the legal representatives of

FRANCIS KILONZO LELU-Deceased).....RESPONDENTS

(Being an appeal from the judgment and decree of Honourable D.W. Mburu

(Mr.) (Principal Magistrate) delivered on 20th November, 2015

in CMCC No. 6265 of 2014)

JUDGMENT

1. The respondents instituted the suit against the appellant herein in their capacity as the legal representatives of the estate of Francis Kilonzo Lelu (“*the deceased*”) vide the plaint dated 15th October, 2014 and sought for general and special damages as well as costs of the suit and interest on the same.
2. The respondents pleaded in their plaint that the deceased was at all material times an employee of the appellant, working as a casual labourer.
3. The respondents stated in their plaint that on the material day which was sometime on or about the 13th of September, 2013 the deceased was in the course of his employment at the appellant’s construction site at Industrial Area, engaged in fastening bolts on shatters and gutters when the wooden structure supporting his weight broke down, causing him to fall down and sustain fatal injuries.
4. It was also pleaded that the deceased’s death was the result of negligence and breach of statutory duty on the part of the appellant, the particulars of which featured in the plaint.
5. It was further pleaded that at the time of his death, the deceased was aged 22 years and was earning a daily income of Kshs.700/ while working for 6 days a week; adding that the deceased left behind the following dependants:
 - a. Lelu Kaluve Nyamai Father
 - b. Catherine Nthenya Kyalo Wife
 - c. Alphonse Mwambi Son
- d. The appellant entered appearance upon being served with summons and filed its statement of defence on 2nd December, 2014 fundamentally denying the occurrence of the accident and pleading in the alternative that if the accident occurred, then the same was caused solely by the negligence of the deceased.
6. The appellant further denied the particulars of breach of statutory duty averred in the plaint, and urged that the suit be dismissed with

costs.

7. At the hearing of the suit, a consent on liability was recorded by the parties in the ratio of 70:30 in favour of the respondents. According to the record, the parties also entered into a consent in respect to *inter alia*, the deceased's earnings; the number of his dependants; and the filing of written submissions on the dependency ratio and multiplicand to assist the court in assessing damages.

8. The parties filed and exchanged written submissions, following which the trial court entered judgment in the following manner:

| | |
|-------------------------------------|------------------------|
| a) Liability | 70%:30% |
| b) General damages | |
| i) Pain and suffering | Kshs.50,000/ |
| (ii) Loss of expectation of life | Kshs.100,000/ |
| (iii) Loss of dependency | Kshs.5,016,000/ |
| | Kshs.5,166,000/ |
| Less award under the Law Reform Act | (Kshs.150,000/) |
| | Kshs.5,016,000/ |
| Less 30% contribution | (Kshs.150,000/) |
| Total | Kshs.3,511,200/ |

9. Being dissatisfied with the assessment of the damages, the appellant has now lodged an appeal against the same through the memorandum of appeal dated 17th December, 2015 featuring the following grounds:

i. THAT the learned trial magistrate erred in giving a 33-year multiplier for a 22-year old when the maximum multiplier cannot exceed 17 years.

ii. THAT the learned trial magistrate in finding that the loss of dependency was Kshs.5,016,000/ did not take into account the fact that the loss of dependency should not have exceeded what the respondents lost as a result of the death. The sum of Kshs.5,016,000/ if banked in a fixed deposit account at 10% p.a. could mean the respondents would receive a monthly sum of Kshs.42,637.20/ whereas such loss was 2/3 of Kshs.12,000/ taking into account PAYE. The learned trial magistrate therefore erred in awarding the sum of Kshs.5,016,000/ to the respondents, thus making them better off than what they were receiving during the lifetime of the deceased. That is to say the learned trial magistrate did not take into account the fact that such sum could be invested in interest bearing accounts and also did not consider the effect of the Court of Appeal's decision in the cases of DAINTY V HAJI & ANOTHER C.A. NO. 59 OF 2004, BAKARI V OLESA (1982-88)1 KAR 103 and AYA V NYAMBURA (1982-88) 1 KAR 765.

iii. THAT the learned trial magistrate in awarding Kshs.100,000/ for loss of expectation of life failed to take into account the case of ASAL V MUGE & ANOTHER (2001) KLR 203.

iv. THAT the learned trial magistrate erred in not considering sufficiently or at all the case law quoted on behalf of the appellant.

10. The appeal was canvassed by written submissions. The appellant filed its submissions first on 14th June, 2019 arguing that since the beneficiaries to the estate of the deceased were the same under the Law Reform Act and the Fatal Accidents Act, then they ought not to have been awarded damages for loss of expectation of life under the Law Reform Act as to do so would amount to double compensation, citing the case of *Kemfro v AM Lubia & Another (1982-1988) 1 KAR 727*.

11. As concerns the award for loss of dependency, it was the appellant's submission that the same ought to be commensurate to what the deceased brought home during his lifetime. More specifically, the appellant challenged the multiplier of 33 years applied by the trial court, urging instead that a multiplier of 17 years would have sufficed.

12. In advancing the above point, the appellant placed reliance on *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR* where the Court of Appeal upheld a multiplier of 16 years for a deceased person aged 17 years old when he died, and *Roger Dainty v Mwinyi Omar Haji & another [2004] eKLR* where a multiplier of 10 years was applied similarly by the Court of Appeal to a person who died aged 27 years.

13. Additionally, the appellant affirmed that in making the award on loss of dependency, the trial court did not appreciate that the money awarded could be invested, thereby leading to a sum that exceeded what the deceased was giving to his dependants during his lifetime. Further to this, the appellant advanced the argument that the damages under this head ought to have been calculated subject to PAYE deductions of Kshs.1000/ such that the deceased's net income would have been about Kshs.17,900/ given that his gross income came to

about 18,900/.

14. It was equally the appellant's submission that a dependency ratio of $\frac{1}{2}$ would have been reasonable, so that the total amount would read thus: $17,900/ \times \frac{1}{2} \times 12 \times 17 = 1,825,800/$

15. In their opposing submissions, the respondents began by supporting the award of Kshs.100,000/ for loss of expectation of life, stating that the same applied as a conventional figure and hence there is no basis for interference.

16. In addressing the award on loss of dependency, the respondents took the position that given the deceased's age and good health prior to his death, the trial court correctly applied the standard age of retirement in settling for a multiplier of 33 years.

17. The respondents further contended that the deceased's monthly income of Kshs.18,912/ was rounded off to Kshs.19,000/ which was correctly applied without the need for deductions of PAYE since the deceased was a casual labourer. It was likewise submitted that it was not disputed that the deceased was a family man and at least $\frac{2}{3}$ of his salary went towards supporting his family, hence the trial court arrived at a reasonable award under this head. On this basis, the respondents urged this court not to interfere with the award made.

18. I have considered the rival submissions plus the authorities cited. This being a first appeal, I am required to re-evaluate the evidence placed before the trial court, which I have done.

19. It is noted that the appeal is restricted to quantum, more specifically the awards made under the heads of loss of expectation of life and loss of dependency. I will therefore address the grounds of appeal under these two (2) heads.

20. The courts have held time and time again that when it comes to quantum, the award of a trial court ought only to be interfered with under the following circumstances:

a. Where an irrelevant factor was taken into account.

b. Where a relevant factor was disregarded.

c. Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

21. Having laid out the above, I will now first address the award on loss of expectation of life pursuant to ground (iii) of the appeal. On their part, the respondents proposed the award of Kshs.100,000/ under this head before the trial court. The appellant on its part stood its ground that the respondents are not entitled to such award since an award for loss of dependency would still be made to them. In the end, the trial court awarded the sum of Kshs.100,000/.

22. I have taken into account the fact that courts have in the past awarded a conventional sum of Kshs.100,000/ in damages for loss of expectation of life which concurs with what the learned trial magistrate awarded the respondents. Moreover, such award is catered for under the Law Reform Act, Cap. 26.

23. However, the appellant brought forth the issue of double compensation in this respect, drawing from *Dilip Asal v Herma Muge & another [2001] eKLR* which I too must consider. I have looked at the aforesaid decision and note that the court addressed the subject of double compensation with reference to awards under the heads of loss of dependency and lost years respectively. The court in that case faulted the trial court for awarding damages under the two heads without taking into account the fact that the beneficiaries were the same in both instances.

24. Drawing from the foregoing, it can be said that the issue of double compensation largely becomes applicable when it comes to damages for lost years vis-à-vis those for loss of dependency where the beneficiaries are the same. In the present occasion, the respondents sought for damages for loss of expectation of life which damages are distinctly provided for under the Law Reform Act and which have no direct correlation with an award for loss of dependency or lost years for that matter. Consequently, I find that the learned trial magistrate was justified in awarding damages for loss of expectation of life and in any event, such award fell in line with conventional awards previously made. I see no need to disturb the same.

25. I now turn my attention to the award under the head of loss of dependency which was equally challenged under grounds (i) and (ii) of the grounds of appeal. Going by the lower court record, it is disclosed the parties entered into another consent dated 28th August, 2015 and filed on 10th September, 2015 on the admission of certain facts without requiring the production of further evidence. Incorporated into the consent order were the facts that the deceased was earning the monthly sum of Kshs.19,000/ as a carpenter prior to his death; that he is survived by his wife, son and father and that the parties were to file written submissions on the ratio of dependency and the multiplicand.

26. Having done so, the respondents proposed a dependency ratio of $\frac{2}{3}$ on the basis that all the deceased's dependants relied on him for support. The respondents further proposed a multiplier of 35 years and a multiplicand of Kshs.19,000/ going by the consent recorded. It was thus the respondents' position that the award read as follows:

$$19,000 \times \frac{2}{3} \times 35 \times 12 = \text{Kshs.}5,320,000/$$

27. The appellant maintained that since the deceased was survived by his wife and child, a dependency ratio of $\frac{1}{2}$ would suffice. On the multiplier, the appellant urged that 17 years be applied. As relates to the multiplicand, it was the appellant's submission before the trial court

that a net income of Kshs.17,900/ be applied so as to read thus:

$$17,900 \times \frac{1}{2} \times 17 \times 12 = \text{Kshs.1,825,800/}$$

28. Finally, the trial court opted to adopt a multiplier of 33 years, a dependency ratio of 2/3 and a multiplicand of Kshs.19,000/ in arriving at the following award:

$$19,000 \times \frac{2}{3} \times 33 \times 12 = \text{Kshs.5,016,000/}$$

29. In view of the foregoing, I have gathered that whereas the appellant has brought to question the multiplicand of Kshs.19,000/ applied by the learned trial magistrate, it is evident from the consent that the deceased's earnings guiding the multiplicand was settled by the parties. There is no indication that the consent has been challenged, hence I have no basis on which to now interfere with the multiplicand applied.

30. Even if the circumstances were different, it is not in dispute that the deceased was a casual worker and I am therefore doubtful that his salary was subjected to statutory deductions such as PAYE; and in any case, no evidence was adduced before the trial court to indicate such position.

31. In light of the above, I will focus on the multiplier followed by the dependency ratio. As concerns the multiplier, the parties are in agreement as to the age of the deceased. The respondents further availed a copy of his death certificate indicating that he was 22 years old when he passed on. I have re-evaluated the authorities submitted by the parties before the trial court: the respondents relied on the case of *Loise Wairimu Mwangi & another v Joseph Wambue Kamau [2006] eKLR* where the court applied a multiplier of 20 years for a deceased who died at 35 years old, whereas the appellant relied on the cases of *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR* and *Roger Dainty v Mwinyi Omar Haji & another [2004] eKLR* which I have already made reference to hereinabove.

32. In my view, the authorities cited by the parties do not offer comparable multipliers since the ages of the deceased persons therein differ from that of the deceased in the present instance. I have however looked at the case of *Paul N. Kinyanjui v Esther W. Mbugua [2015] eKLR* where the High Court on appeal substituted a multiplier of 30 years with that of 25 years for a deceased aged 23 years. Similarly, the court in *Kenya Power & Lighting Company v Pauline Mbulwa Mustisya (suing as the Administrator of the Estate of the late Bernard Wambua Mutisya) [2019] eKLR* applied a multiplier of 30 years for a deceased who was 24 years of age at the time of his death and unmarried with no children.

33. Being guided by the above-cited authorities and further taking into account the circumstances of the matter before me coupled with the age of the deceased, the vagaries of life and the fact that he had a young family of his own, I find the multiplier used by the learned trial magistrate to be on the higher side and deem it necessary to substitute the same with a reasonable multiplier of 27 years.

34. On the dependency ratio, while no evidence was placed before the trial court to show the extent of dependency upon the deceased, it is noted that a consent is in place pointing to dependency by three (3) persons, including the 2nd respondent who is the deceased's father. In the premises, I am satisfied that the learned trial magistrate applied a reasonable ratio of 2/3 since the deceased died quite young and it is plausible that his dependants would have continued to rely on his support for years to come. Resultantly, the award under this head is made in the manner hereunder:

$$19,000 \times \frac{2}{3} \times 27 \times 12 = \text{Kshs.4,104,000/}$$

35. Notwithstanding the fact that, in my view, the learned trial magistrate arrived at an erroneous award for loss of dependency, I am satisfied that there is nothing to indicate that the learned trial magistrate overlooked the appellant's submissions.

36. The upshot is that the appeal succeeds only to the extent of the award for loss of dependency. Consequently, the trial court's award of Kshs.5,016,000/ under that head is hereby set aside and is substituted with an award of Kshs.4,104,000/ tabulated as follows:

$$19,000 \times \frac{2}{3} \times 27 \times 12 = \text{Kshs.4,104,000/}$$

37. For the avoidance of doubt, the judgment on appeal is as follows:

(a) General damages

(i) Pain and suffering Kshs.50,000/

(ii) Loss of expectation of life Kshs.100,000/

(iii) Loss of dependency Kshs.4,104,000/

Kshs.4,254,000/

Less award under the Law Reform Act (Kshs.150,000/)

Gross total Kshs.4,104,000/

30% contribution

(Kshs.1,231,200/)

Net total

Kshs.2,872,800/

(b) Costs of the suit is given to the respondents.

In the circumstances of this appeal, a fair order on costs of the appeal is to order that each party meets its own costs of the appeal.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondents