



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 21 OF 2017

BETWEEN

MINI BAKERIES (NAIROBI) LIMITED APPELLANT

AND

OSCAR OGADA ORENGO &

EVERLYNE KENYANI suing as legal representatives of estate of

DANSON ORENGO OGAGA (DECEASED)RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. W.K. Onkunya, SRM dated 15th February 2017 at the Chief Magistrates Court at Kisumu in Civil Case No. 546 of 2015)

JUDGMENT

1. The subordinate court found the appellant fully liable for an accident that took place on 2nd March 2015 in which the deceased died. The plaint alleged that the deceased was riding a motorbike registration number KMDW 511A along the Ahero-Kisumu Road when the appellant's driver negligently drove a lorry registration number KBW 408W causing to collide with the motorcycle. Thereafter the deceased's estate and dependants filed suit under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** and were awarded **Kshs. 3,394,594/-** made up as follows;

(a) Pain and suffering	Kshs. 50,000/-
(b) Loss of expectation of life	Kshs. 140,000/-
(c) Loss of dependence	
(Kshs. 10,954/- X 12X35X2/3)	Kshs. 3,067,316/-
(d) Special damages	Kshs. 137,253/-

TOTAL

Kshs. 3,394,569/-

2. The appellant does not contest the trial court's findings on liability. In its memorandum of appeal dated 7th March 2017, the appellant challenged the award of damages on the grounds outlined by its counsel, Ms Wesonga. She contended that the trial magistrate erred in applying the wrong principles in assessment

of damages. She submitted that the trial magistrate erred in law and in fact in awarding damages both under the **Law Reform Act** as well as the **Fatal Accidents Act** without taking into consideration that the damages would devolve to the same individuals in the circumstances. She further submitted that the trial magistrate erred in adopting a dependency ratio of 2/3 in view of the number of the dependants. She suggested that a ratio of 1/3 was appropriate given that the deceased's siblings were not dependants. Counsel also submitted that the trial magistrate erred in adopting a multiplier of 35 years, without taking into account life's vagaries and vicissitudes. She was of the view that a multiplier of 26 to 29 years was most appropriate. All in all, she argued that the entire award was manifestly excessive in the circumstances.

3. Counsel for the respondents, Mr Odino, supported the decision of the trial court. In his view, the trial magistrate considered all the facts and evidence and came to the correct conclusion in assessing the multiplier and the dependency ratio.

4. In dealing with the issues in contention, I must bear in mind two principles. First, the first appellate court must re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination as to whether or not to uphold the decision of the trial magistrate bearing in mind that it neither saw nor heard the witnesses testify (see **Peters v Sunday Post Ltd [1958] EA 424**). Second, for the appellate court to interfere with an award of damages it must be shown that the trial court, in awarding of the damages, took into consideration irrelevant factors or failed to take into account relevant factors or the sum awarded is inordinately low or high so as to lead to the conclusion that the award was a wholly erroneous estimate of the damage. The appellant may also establish that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

5. According to the plaint, the deceased was 20 years at the time of his death. He was working as a shopkeeper earning an average income of Kshs. 30,000/- daily which he was using to maintain himself, his wife, parents and siblings. He named his dependants as his father and mother both aged, 37 years, his wife aged 17 years and his sister and brother aged 4 and 3 years respectively. The principal witness was the deceased's father, Oscar Ogada Orengo (PW 2) outlined the facts as pleaded as his testimony. He stated that the deceased was a shopkeeper, earning Kshs. 1000/- a day which he used to assist his younger siblings for payment of school fees. He stated that the deceased had a fiancé who was aged 17 years old.

6. The first issue concerns the dependency ratio. The trial magistrate held that since the deceased used 70% of his earnings in paying schools fees for his younger siblings, a ratio of 2/3 was appropriate in the circumstances. Counsel for the appellant pointed out that the persons named as dependants were not dependants within the meaning of **section 4(1)** of the **Fatal Accidents Act** which states;

Every action brought by nature 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 be brought by and in the name of the execution or administrator of the person deceased]..... [Emphasis mine]

The brothers and sisters of the deceased are not dependants for purposes of the **Fatal Accidents Act** hence the dependency ratio would definitely reduce when this is taken into account.

7. The other contested issue was whether the deceased had a wife. Counsel for the appellant contended that from the evidence she was just a fiancée and not a wife. She further contended from the evidence it emerged that she was 17 years old and therefore lacked the capacity to be married. Indeed, the letter from the Chief of Tambua Location dated 20th March 2015 noted that the deceased left behind a fiancée. In my view, a fiancée is not wife and the evidence does not show that either there was a marriage or disclose facts upon which a marriage may be presumed based on cohabitation and repute. Moreover, a marriage cannot be imputed if the person lacked capacity to marry (see generally **Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No.13 of 1976 (UR)** and **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR**).

8. The sum of the evidence is that the deceased was not married. The assessment of the dependency is a

question of fact. In **Boru v Onduu [1988-1992]KAR 299**, the Court of Appeal stated that:

The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it, the judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle in such situation.

9. Taking the fact that only the deceased's parents were the only dependants contemplated under the **Fatal Accident Act**, I find that the trial magistrate erred in adopting a dependency ratio of 2/3. It was unjustified, hence I would adopt a dependency ratio of 1/3.

10. The second issue concerns the multiplier which the appellant complained was on the higher side. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In **Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004]eKLR** the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life of the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. In this case, the trial magistrate calculated the multiplier on the basis that the appellant would be in business until he was 55 years and awarded a multiplier of 35 years, taking into account, "*the vicissitudes of life that would have most likely shortened his life including natural causes*".

11. Having concluded that the deceased would have worked until the age of 55 years, by awarding the maximum possible multiplier, the trial magistrate failed to take into account the vicissitudes of life and the other imponderables. For example, since the only dependants were parents, the court ought to have considered the expected period of dependency. I have also considered the multiplier applied in similar cases; In **David Kajogi M'mugaa v Francis Muthomi MRU HCCA No. 118 of 2010[2012]eKLR**, the deceased died at the age of 23 and a multiplier of 25 was adopted. In that case, the court also cited **Benard Maina (suing on behalf of the estate of Joshua Kinyua Maina) v Francis Ndicu NRB HCCC No. 1503 of 1991(UR)** where a multiplier of 20 years was used where the deceased was 20 years and **Godfrey Thamu Kinyua v Charles K. Gicheru & Others NRB HCCC No. 340 of 1991(UR)** where a multiplier of 20 years was applied where the deceased was 22 years old. I would therefore, taking into account the factors and decisions I have outlined above, award a multiplier of 26 years proposed by the appellant.

12. The third issue concerns the so-called duplication of awards under the **Law Reform Act** and the **Fatal Accidents Act** leading to double compensation. Damages for lost years under the **Law Reform Act** are recoverable for the estate of the deceased where the deceased died before he could institute an action. Under **section 2(5)** of the **Act** such damages are recoverable for the benefit of the estate and are in addition to any rights conferred on dependants of the deceased by the **Fatal Accidents Act**. A claim under the **Fatal Accidents Act** is made by the dependants of the deceased who claim for loss of the support the deceased during his lifetime.

13. Although the principles of assessment are similar, the court cannot make an award for lost years and loss of dependency as the benefits would ultimately devolve to the same parties under both Acts and this would amount to double compensation. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** as follows;

[T]he 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.

14. The principal does not mean that a claimant under the **Fatal Accidents Act** should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the **Law Reform Act**

hence the issue of duplication does not arise regarding that aspect of the award. The Court of Appeal clearly elucidated this point in ***Hellen Waruguru Waweru suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited*** NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR where it stated that;

*[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the **Law Reform Act** and dependants under the **Fatal Accidents Act** are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the **Fatal Accidents Act** should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the **Law Reform Act**, hence the issue of duplication does not arise.*

15. In conclusion therefore, the trial magistrate did not err in making awards both under the *Law Reform Act* and the *Fatal Accidents Act*.

16. I allow the appeal to the extent that I set aside the award for loss of dependency and substitute an award of **Kshs. 1,139,288.80** made up as follows; **10,954.70 X 12 X 26 X 1/3**.

17. The appellant shall have costs of the suit which I assess at **Kshs. 50,000/-** all inclusive.

DATED and DELIVERED at KISUMU this day of 17th January 2018.

D.S. MAJANJA

JUDGE

Ms Wesonga instructed by Onyinkwa and Company Advocates for the appellant.

Mr Odino instructed by Geoffrey O. Okoth and Company Advocates for the respondent.