



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 23 OF 2017

MOMBASA MAIZE MILLERS LIMITED....APPELLANT

VERSUS

**CHRISPINE ASOYO (suing as a personal
representative/administrator of the estate of
Martina AsoyoAkinyi).....RESPONDENT**

(Being an Appeal from the Judgment and Decree in

Kisumu CMCC No. 149 of 2012 delivered by

Hon. J.Ngarngar (CM) on 1stMarch, 2017)

JUDGMENT

1. **CHRISPINE ASOYO**(*hereinafter referred to as respondent*) sued **MOMBASA MAIZE MILLERS LIMITED**(*hereinafter referred to as appellant*) in the lower court claiming damages for fatal injuries suffered by his sister, **Martina AsoyoAkinyi**, who suffered fatal injuries on 3.2.12 when M/V KBN178K that she was travelling in collided with respondent's M/V KBE 252L allegedly due to the negligence of the appellant.

2. The defendant/appellant filed a statement of Defence and denied the claim.

3. In a judgment delivered on **1st March, 2017**, the trial court found the appellant 100% liable and awarded damages in the sum of Kshs.6,325,440/-.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 6.12.17 filed the Memorandum of Appeal dated 8.3.17 which sets out 5 grounds of appeal that may be summarized into the following two major grounds that:-

1) The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same

2) The Learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities cited in the written submissions presented and filed by the appellants

3) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable

4) The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the respondent's claim

5) The Learned trial Magistrate failed to apply himself judicially and to adequately evaluate evidence and exhibits tendered

on quantum and thereby arrived at a decision unsustainable in law

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. Appellant holds the view that the multiplicand applicable should have been the net earnings and not gross salary as applied by the trial court. It was also submitted that the trial court failed to have deduct damages under the Law Reform Act from the damages under the Fatal Accidents Act thereby awarding the respondent double compensation. Appellant relied on the following authorities.

1. DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] EKLK

2. HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED VS. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014

3. KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI .V. A.M. LUBIA AND OLIVE LUBIA (1985) 1KAR 727

Respondent's submissions

7. It was submitted for the respondent that the trial court correctly applied the gross salary as the multiplicand. Respondent submitted that awards under both the Law Reform Act and the Fatal Accidents Act do not amount to double compensation. In support thereof, he placed reliance on Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that -

“the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependents of the deceased by the Fatal Accidents Act ... anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya.”

and Section 2(5) of the Law Reform Act which reiterates the provision and says: -

“(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom.”

Analysis and Determination

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] eKLR**. It then behooves this court to summarize the evidence that was tendered before the trial court.

9. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

10. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of multiplicand, and whether the court should make awards both under the Fatal Accidents Act and Law Reform Act.

11. It is on record that deceased was a salaried employee of Masinde Muliro University. **Charlesworth on Negligence (3rd Edition), pp 560 & 561, para. 909** provides as follows:-

“Method of calculating damages: When the income of the deceased is derived from his own earnings, ‘it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have been available to the benefit of the individual claiming compensation.’ The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependents.....

12. From the foregoing, I find that the trial court erred in applying the gross salary to calculate damages for loss of dependency.

13. The average of deceased's net earnings from the 3 pays slips tendered in evidence is Kshs. 19,112/- which is the appropriate multiplicand that ought to apply to this case.

14. I have considered the holding in **HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED VS. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014** where the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

“...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

15. In the case of **DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] eKLR**, Mativo J, had this to say about Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act

“I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.”

16. The judge cited in *Richard Omeyo Ominovs Christine A. Onyango* Kisumu Civil Appeal No. 61 of 2007 with approval where **Karanja J** where the learned judge discussing the provisions of Section 2 (5) of the Law Reform Act stated:-

“The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.”

The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

17. I fully associate myself with the findings in the above cited cases and I therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

Disposition

18. In view of the finding I have, the appeal partially succeeds. I substitute the judgment of the trial court on loss of dependency with the sum of Kshs. $19,111 \times \frac{2}{3} \times 20 \times 12 =$ **Kshs.3,057,760.00**. The award on pain and suffering and loss of expectation of life remain as awarded by the trial court.

The respondents will have ½ costs of the appeal.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF April, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Carolyne

Appellant - Mr. Bagada Holding Brief for Menezes

Respondent - Mr. Alinaitise Holding Brief for Onyango