



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 98 OF 2015

JOSEPHINE KIRAGU

(SUING AS ADMINISTRATOR AND THE LEGAL REPRESENTATIVE OF

RAPHAEL KIRAGU KAMAU APPELLANT

VERSUS

VYAS HAULIERS LTD. RESPONDENT

(An appeal from the Judgment of Hon. L.T. Lewa, Resident Magistrate, delivered on 12th June, 2015 in Mombasa CMCC No. 1049 of 2008)

JUDGMENT

1. The appellant Josephine Kiragu on 10th July, 2015 filed a Memorandum of appeal raising the following grounds of appeal:-

- i. That the Learned Resident Magistrate erred in law and in fact by awarding a sum of Kshs.536,000/= for damages sort (sic) under the Fatal Accident Act Cap 32, and the Law Reform Act Cap 26, against the weight of the evidence on record;
- ii. That the Learned Resident Magistrate erred in law and in fact by awarding a sum of Kshs.300,000/= for loss of dependency against the weight of the evidence on record;
- iii. That the Learned Resident Magistrate erred in law and in fact by awarding the plaintiff Ksh.10,000/= for pain and suffering against the weight of evidence on record.

2. For the foregoing reasons, the appellant prays that the appeal be allowed, the Judgment of the lower court be set aside and be substituted with an order upholding the action, an assessment of special damages and an appropriate order for costs be made in respect of the proceedings of the court below.

3. Counsel for the appellant filed his written submissions on 18th July, 2016 while that of the respondent filed his on 25th July, 2016. They thereafter highlighted their submissions.

APPELLANT'S SUBMISSIONS

4. Mr. Tole, Learned Counsel for the appellant argued his grounds of appeal in unison. He stated that the

award for loss of suffering at the sum of Kshs.10,000/= was manifestly low considering that the deceased fell from a lorry and was crashed by the said vehicle. He referred the court to the case of **Alice O. Alukwe vs Akamba Public Road Services Ltd. & 3 Others**, [2015] eKLR where a sum of Kshs.50,000/= was awarded for pain and suffering. In his view, an award of Kshs.100,000/= should have been made under the same head.

5. Counsel submitted that the award of Kshs. 300,000/= for loss of dependency was too low. He relied on the case of **Mbogo vs Shah and Another** [1968] EA 93 to show the extent to which an appellate court can interfere with discretion of the lower court in instances where the court has shown that it has not taken into consideration or took into account issues that it should not have considered.

6. The court was informed that the dependants herein are the deceased's aged mother and two sisters who depended fully on him. Taking into account that that his age was twenty eight (28) years, the award made was manifestly low and the Magistrate failed to demonstrate the formula she used in arriving at the said figure.

7. Mr. Tole further submitted that the Magistrate failed to take into account the number of years that had elapsed since the year 2002 when the accident happened and the delivery of the Judgment in the year 2015.

8. He prayed for the Judgment of the lower court to be set aside on the awards of loss and suffering and loss of dependency. He urged the court to review the award for the same. He also prayed for costs and interest.

RESPONDENT'S SUBMISSIONS

9. Ms. Mango, Learned Counsel for the respondent informed the court that the award of Kshs.10,000/= for pain and suffering was adequate in the circumstances. This being for the reason that the deceased died on the spot and no contrary evidence was led to show how long he took before dying. She referred the court to PW2's evidence in that regard. She added that under the Fatal Accidents Act, no names were given of the dependants and the salary that the deceased used to earn. In her view, PW1 who was the deceased's sister was not a dependant under the Fatal Accidents Act. Counsel submitted that although the deceased's mother was mentioned during the trial, she did not testify, thus her existence was not proved. The deceased was not married and he had no children. As such, the sum of Kshs.300,000/= was adequate.

10. Ms. Mango submitted that the court awarded special damages although they were not specifically pleaded and proved. She urged the court to uphold the lower court decision.

DUTY OF THE FIRST APPELLATE COURT

11. This being a first appellate court, I have a duty re-examine and analyze the decision of the lower court and come to my own independent decision. This duty is well articulated in the case of **Peters vs Sunday Post Ltd.** [1958] EA 424, where Sir Kenneth O'Connor, P. stated at page 429 as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witness. But the jurisdiction should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion. Accordingly only when the finding of fact is challenged on appeal is based on no evidence or on misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this court interfere with it.”

THE EVIDENCE BEFORE THE LOWER COURT

12. Millicent Njoki testified as PW1. She informed the court that the deceased was her brother. She was issued with limited letters of administration for which she paid Kshs.15,500/=. She stated that the

deceased used to work for the defendant. She produced his workman's compensation form as plaintiff exhibit 4 to show that he was an employee of the said company where he worked as turn boy. She added that he was a trained driver and welder. PW1 informed the court that the deceased passed away on 27th December, 2002 when fell from the trailer. The same vehicle hit him and he died on the spot. The accident was reported to Makupa Police station where they were issued with a police abstract. They incurred Kshs.70,000/= as funeral expenses. In PW1's view, the respondent should have provided a good and safe work environment for its employees. She informed the court that the deceased used to pay her school fees of Kshs.10,000/= annually. He used to support his mother and partly pay school fees for his other sister.

13. PW1 testified that the deceased who was her first born brother was twenty eight years (28) old, single and had no children. She stated that his salary was Kshs. 4,370.00 per month. She informed the court that her mother was alive and lived upcountry but she does not work. They support her.

14. PW 1 produced the deceased's death certificate as plaintiff exhibit 1 (Plt. Exh), letters of administration as Plt. Exh 2, receipt for payment for a limited grant as Plt. Exh. 3, a demand letter as Plt. Exh. 6 and statutory notice to Geminia Insurance as Plt. Exh. 7.

15. PW2 was No. 71455 Police Constable Patrick Kamau attached to Makupa Police Station Traffic section. He informed the court that an accident happened on 27th December, 2002 along Beira road in Shimanzi. It involved motor vehicle registration No. KAH 580M Isuzu lorry which had a trailer ZA 346. The vehicle was being driven by Francis Mutua Mbuvi of Vyas Hauliers. PW2 further stated that a loader, Rapheal Kiragu fell from the lorry and was run over by the trailer and died on the spot. PW 2 produced a police abstract form as Plt. Exh. 5.

16. The defence closed its case on 19th February, 2015 without calling any witnesses.

17. The Honorable Resident Magistrate considered the evidence tendered and found that although PW1 had stated that the deceased was earning Kshs. 4,370.00 there was no proof adduced to support that claim and awarded a global sum of Kshs.300,000/= for loss of dependency. It was also her finding that the deceased's sisters were at the time the case was being heard, mature adults, with the mother being elderly and deserving more support than the two sisters.

18. On making an award of Kshs.10,000/= on pain and suffering, the Hon. Magistrate found that the deceased's death was instantaneous. On loss of expectation of life, the Hon. Magistrate found that the deceased died in his prime when he was a vibrant, energetic healthy young man. His life was abruptly cut short by the accident. Had it not been for the accident, the deceased would probably have lived a long fulfilling life. The Magistrate made an award of Kshs. 200,000/= in that regard. The Magistrate also made an award of Kshs. 43,000 as special damages. He noted that although the only receipt produced was for Kshs. 15,000/=, he was guided by the Court of Appeal decision in **Premier Dairy Ltd. vs Amarjit Singh Sagoo & Another** [2013] eKLR where the court took judicial notice that in Kenya dead bodies are always interred and as such, funeral costs are incurred. The Magistrate used that as a basis of awarding special damages.

Analysis and determination.

The issues for consideration and determination are:-

- i. If the award of Kshs.300,000/= for loss of dependency was manifestly low.
- ii. If the award made for pain and suffering was adequate.

19. The respondent tendered no evidence in support of its case. This therefore leaves the appellant's case uncontroverted. It is therefore not in doubt that the deceased was an employee of the respondent. He was in the cause of duty as a turn boy of motor vehicle registration No. KAH 580M owned by the respondent when the accident happened. According to PW2, the deceased was crashed by the trailer of the said

vehicle when he fell down. Although PW1 gave evidence that the deceased was supporting her sister and their mother, section 4(1) of the Fatal Accidents Act does not recognize sisters of a deceased person to be dependants.

20. Although the respondent's Counsel submitted that the deceased's mother did not adduce evidence and therefore her existence was not proved, I find the said submission misplaced. The documents in the lower court record show that the deceased's mother, Josephine Njambi Kiragu was granted limited letters of administration to enable her file the suit in the lower court against the defendant (respondent). The 2nd plaintiff who testified as PW2 only came into the picture at a later date after a consent was filed in court on 6th July, 2010 whereby the 1st plaintiff (appellant) as the administrator of the estate of the deceased consented to the letters of administration to the deceased's estate being granted to the 2nd plaintiff. Consequently, the plaint was amended to enjoin the 2nd plaintiff. From the foregoing facts, the existence of the deceased's mother (appellant) is a non-issue. She did not have to testify to prove that she existed.

21. Moving to the issue of loss of dependency, Judge Emukule, in the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another** [2013] eKLR had this to say:-

“There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of a farm manager would remain in active work and retire.”

22. In the present case, the deceased who was twenty eight (28) years of age, was working as a turn boy for the respondent. In determining the loss of dependency, I am guided by the decision of Ringera J. (as he then was) in the case of **Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny & Another** Nairobi HCCC No. 1638 where he stated as follows:-

“The principle applicable to an assessment of damages under the Fatal Accidents Act are too clear. The court must in the first instance find out the value of annual dependence. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years of purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if widely invested yield returns of an income nature.”

23. PW1 informed the court that the deceased was earning Kshs.4,370/= per month. She did not produce any documents to support that assertion. In establishing the salary that was payable to a turn boy in the year 2002, this court has resorted to the **Regulation of Wages and Conditions of Employment Act (General) (Amendment) Order, 2002, Legal Notice No. 86 of 2002** which came into force on 1st May, 2002. It stipulates that the monthly salary for a turn boy was Kshs.3,800/=. This court will therefore use this figure to work out the loss of dependency. The appellant's Counsel was correct in submitting that the Hon. Magistrate did not show how she arrived at the figure of Ksh.300,000/= as loss of dependency. Taking into account that the deceased was twenty eight (28) years old when he died, this court is of the view that he would have worked up to the retirement age of 60 years. Giving due regard to vagaries and uncertainties of life, I will apply a multiplier of 25 years. The damages under the Fatal Accidents Act for loss of dependency will therefore be $Kshs.3,800 \times 12 \times 25 \times 1/3 = Kshs.380,000/=$. I hereby set aside the award of Kshs.300,000/= for loss of dependency and substitute thereof an award of Kshs.380,000/=

24. On the issue of pain and suffering, in the case of **Benedeta Wanjiku Kimani** (supra) the court had the following to say:-

“For award of damages under the Fatal Accidents Act for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from

Kshs. 10,000/= to shs. 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently that life itself was until cut short by the accident worth something to the estate."

25. In the present case, the deceased died instantly. It is however my considered opinion that his death which was occasioned by being run over by a trailer must have resulted in excruciating pain before he died. I also consider that an award of Kshs.10,000/= for pain and suffering in the year 2015 when the judgment was delivered was on the lower scale due to the passage of time from when the accident happened in the year 2002. I therefore set aside the award of Kshs.10,000/= and hereby substitute an award of Kshs.30,000/= for pain and suffering.

26. The Hon. Magistrate properly directed herself on the issue of loss of expectation of life and special damages. I will not interfere with the said awards. There shall be Judgment for the appellant against the respondent made out as follows:-

- i. Loss of dependency – Kshs.380,000/=
- ii. Pain and suffering – Kshs.30,000/=
- iii. Loss of expectation of life – Kshs.200,000/=
- iv. Special damages – Kshs.43,000/=

Gross amount awarded Kshs.653,000/=

Less Kshs.240,000/= paid as workman compensation.

Net amount: Kshs.413,000/=

27. I award the appellant the sum total of Kshs.413,000/= as damages. Having noted that the only person entitled to loss of dependency is the deceased's mother, Josephine Kiragu, the payment shall be made to her. I also award costs of the case in the lower court and this appeal to the appellant. Interest is awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of January, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Siminyu holding brief for Mr. Gachiri Kariuki for the appellant

No appearance for the respondent

Oliver Musundi - Court Assistant