



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 87 of 2016

MOMBASA MAIZE MILLERS COMPANY LIMITED.....
.....APPELLANT

VERSUS

FRIDAH MMBONE MUGILULI

RAMADHAN SAID LUSAS

suing as a personal representative of the estate of

ALI OMAR MATANO.....

RESPONDENTS

(Being an Appeal from the Judgment of Hon. B.Kasavuli (SRM) in Winam PMCC NO.260 OF 2012 delivered on 4th November 2016)

JUDGMENT

Fridah Mmbone Mugiluli and Ramadhan Said Lusasya (*hereinafter referred to as respondents*) sued **Mombasa Maize Millers Company Limited** (*hereinafter referred to as appellant*) in the lower court claiming damages for fatal injuries suffered by Ali Omar Matano, their son and brother respectively, who was injured while travelling in appellant’s M/V KBN 178 N which was involved in an accident along Kakamega-Kisumu Road on 3rd February 2012.

The defendant/appellant filed a statement of Defence and denied the claim. On 29.8.16, parties entered into consent on liability at 80:20% in favour of the respondents as against the appellant.

In a judgment delivered on **4th November 2016**, the awarded damages in the sum of Kshs.1, 498,201.60- after deducting the agreed contributory negligence ratio of 20%.

The Appeal

The Appellant being dissatisfied with the lower court’s decision preferred this appeal and on 1st March 2017 filed the Memorandum of Appeal dated 21st November 2016 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

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

Appellant's submissions

It was submitted that the deceased died in 2012 and the case was filed the same year and that the learned trial magistrate erred in applying the Basic Minimum Wages (Agricultural Industry) Amendment Order for 2015 instead of the one for 2012. The appellant urged court to adopt a multiplicand of Kshs. 3,765/- which was the minimum wage at the time since the deceased's earnings were not proved. To this end, it was submitted that the submission by the respondents that the deceased was earning Kshs. 45,000/- per month was not supported by pleading. The appellant cited the case of **Mumias Outgrowers Company Limited v Regina Achieng Okoth suing as legal representatives of estate of Joseph Odhiambo Jalango (Deceased) [2017] eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLCSC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings:

It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

Respondent's submissions

It was submitted for the respondent that the deceased was a salesman earning over Kshs. 45,000/- which was conceded not to have been proved. It was further submitted that the Regulation of Wages (General) Amendment Order, 2011 was not applicable since it came into effect in June 2012 before the accident occurred and further that the Basic Minimum Wages (Agricultural Industry) Amendment Order, 2012 did not have a provision for a salesman.

Analysis and Determination

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 **Sumaria & Another -Vs- Allied Industrial Ltd (2007)2KLR** and **Selle & Another -Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

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).

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. Having said that; it is my duty to consider whether the learned Magistrate applied the wrong principles in arriving at the multiplicand of Kshs. 10,954.70.

In his judgment; the learned trial magistrate stated as follows:

“The deceased was a businessman (hawking eggs).However, it is clear from the evidence on record that there was no proof of earnings and this being the case, I will adopt the Government minimum wage of Kshs. 10,954.70 as per Legal Notice No. 117/2015.

The Regulation of Wages (General) (Amendment) Order 2015 (*Legal Notice No. 117/2015*) came into operation on the 1st May, 2015. Deceased died in 2012 and the case was filed the same year. The law does not apply *retrospectively* and application this Legal Notice of the same in this case was an error on the part of the learned trial magistrate.

Evidence on record shows that the deceased was not self-employed and the Basic Minimum Wages (Agricultural Industry) Amendment Order, 2012 applicable to employees in the Agricultural Industry would not apply to him. In instances where the deceased’s earnings are not proved; courts resort to the *minimum wage* reserved for unskilled labourers (see *Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased)* [2015] eKLR).

As at February 2012 when the deceased died, the applicable law on wages was The Regulation of Wages (General) (Amendment) Order, 2011 (*Legal Notice No. 64 of 2011*) which came into operation on the 1st May, 2011 and was in force until 1st May 2012 when the Regulation of Wages (General)(Amendment) Order, 2012 came into force. The Regulation of Wages (General) (Amendment) Order, 2011 provides a minimum wage of Kshs. 7,586/- for unskilled workers in Nairobi, Mombasa and Kisumu and this is the applicable multiplicand in this case.

In view of the finding I have reached on multiplicand, I allow the appeal and substitute the judgment of the subordinate court on loss of dependency with the sum of Kshs. $7,586 \times \frac{2}{3} \times 20 \times 12 =$ **Kshs.1,213,760.00.** The award on pain and suffering and loss of expectation of life remain as awarded by the trial court.

The respondents will have costs of the appeal.

DATED AND DELIVERED THIS 29th DAY OF June 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Oduor

Respondents - Mr. Oketch h/b for Mr. Odeny