



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMABAY
CIVIL APPEAL 35 OF 2016

SUKARI INDUSTRIES LIMITED.....APPELLANT

VERSUS

ISMAEL OMBAKA OMAR

EVERLYNE MUKHWANA OMBAKA RESPONDENTS

(Being an appeal from the Judgment and Decree of Hon. B.R. KIPYEGON, RM at the SPMCC in Ndhiwa in Civil Suit No. 22 of 2015 delivered on the 22/08/2016)

JUDGMENT

1. The respondents filed suit in the subordinate court as legal representatives of the estate of the deceased JONAS MALOBA OMBAKA claiming damages under the Fatal Accident Act for their benefit and that of the dependants and under Law Reform Act for the benefit of the estate of the deceased. The learned magistrate apportioned liability on a 50:50 basis claiming negligence on both the deceased and the Appellants part.

2. The respondents were awarded Ksh. 90,000 under the Law Reform Act and Kshs. 1,800,000 under damages under Fatal Accident Act. The amount was then subjected to 50:50 apportioned liability and the sum that was finally awarded to the respondents was Kshs. 945,000/=. By arriving at this award the learned magistrate pronounced himself thus:

“The deceased was an adult casual worker aged 35 at the time of his demise and had no known or proved earnings or even dependants save that he did loading and off-loading for a living. He had one wife and one kid on record as dependants. Although he had no earnings proved in trial, he would earn up to Kshs. 500/= daily which translate to an average of Kshs. 10,000 to Kshs. 15,000 per month. The deceased would have lived or worked longer and taking into account the nature of his employment and the perils of life, I will adopt a multiplier of 18 as proposed by the dependant. Indeed the deceased must have applied a huge part of his earnings to the wife and child hence 2/3 dependency ratio. Loss of dependency would thus be; Kshs. 12,500/= multiplicandx18x12x2/3 hence Kshs. 1,800,000. For loss of expectation of life, the dependant proposed Kshs. 100,000 but the plaintiff felt satisfied at Ksh. 80,000 which is hereby awarded”.
+.-.

3. Being dissatisfied with the award, the appellant filed an appeal on the grounds that:-

1. The learned Trial magistrate grossly misdirected himself in treating 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 on quantum cited in the written submissions presented and filed by the appellant.*

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 inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's herein.*

5. *The learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.*

4. This appeal is therefore limited to the issue of the quantum of damages awarded by the subordinate court.

5. The respondents had pleaded that the deceased who was employed by the appellant died in course of duty while loading sugar cane and tightening the rope on the tractor, the driver drove off as a result the deceased fell off the trailer and was crushed to death.

6. The respondents in their submission on quantum pleaded that under the Law Reform Act the conventional award is Kshs. 80,000. That according to PW1 and PW2 the deceased died on spot and a sum of Kshs. 10,000/= would suffice under pain and suffering.

7. The respondents further pleaded that under the Fatal Accidents Act for loss of dependency the deceased died at 35 years and taking into account that the statutory retirement age is 60 years it meant that the deceased would have worked for 25 more years. They submitted however that due to vagaries of life, a multiplier of 22 years would be appropriate and proposed using the deceased's earnings of Kshs. 500/= per day as a loader to give a total of Kshs. 15,000 per month. As for the dependency ratio they submitted that the deceased was survived by 3 minor children and a wife (one of the respondents); and he was the sole bread winner thus a dependency ration of 2/3 would be appropriate.

8. The respondents' contention was that under the Fatal Accidents Act that a sum of Kshs. 3,000,000-15,000x25x12x2/3- would be appropriate. The total sum they prayed for amounted to Kshs. 3,090,000 (3,000,000+10000+80000). They relied on the case of **NAIROBI HCCC NO 595 OF 2008 FELISTAS AWINO LIJERA VS NICHOLAS MURIITHI KIGERA** where the deceased was aged 27 years and the court adopted a multiplier of 26 years but the statutory retirement age was 55 years.

9. The appellant submitted on quantum that the deceased passed at age 35 years as per the post mortem report dated 6/3/2014; and would have worked until age 53 years. Whilst relying on the case of **BENEDETA WANJIKU (Suing as the administrator of the estate of SAMWEL NJENGA NGUNJIRI-Deceased) v CHANWON CHEBOI & ANWARALI BROTHER LIMITED (2013) eKLR** where it was stated that life expectancy is 45 to 60 years, they suggested a multiplier of 18 years. Under the Law reform Act the appellant suggested Kshs. 10,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life. Under the Fatal Accidents Act the appellant argued that the deceased's earning which was approximated at Kshs. 25,000/- as a cane loader was not prove. That PW1 testified that the deceased was earning a daily income of Kshs. 500/- but she did not have any evidence to support her claim. They suggested an amount of Kshs. 200 per day which would amount to Kshs. 6,000 per month. By using a ratio of 2/3 the appellant came up with a figure of Kshs. 864,000/- under this head.(18x6000x12x2/3)

10. On special damages they stated that they were not specifically pleaded as is required by law. They thus summarized their proposed award as 10,000+100000+864,000=974,000/- less award under Law Reform Act Kshs. 110,000/- net total Kshs. 864,000. Their argument being that the law provided that when an award is made under the Fatal Accidents Act, the awards under the Law Reform Act are to be deducted from the total amount.

11. There is no dispute about the principles applicable in an appeal relating to quantum of damages. The assessment of damages is an exercise of judicial discretion by the trial magistrate and an appellate court should be slow to reverse the trial court unless the court acted on wrong principles or awarded so excessive or little damages that no reasonable court would; or court had not taken into consideration matters it ought not to have considered; or not taken into consideration it ought to have considered and, in the result arrived at wrong result. These principles have been cited and approved in several cases among them; **Butler vs Butler [1984] KLR 225, Butt vs Khan [1981] KLR 349, Kemfro Africa t/a Meru Express & Another vs A. .M. Lubia & Another [1982-88] 1 KAR 72 and Mariga vs Musila [1984] KLR 257.**

12. This brings me to the issues for determination which are:-

i. Whether the learned magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent.

ii. Whether the damages awarded to the respondent by the trial court were inordinately high.

iii. Whether the learned magistrate adequately evaluated evidence and exhibits tendered on quantum before arriving at the sum awarded.

13. The trial magistrate in his judgment acknowledged that the deceased worked as a casual worker and had no known or proved earnings but believed the assertion that he could earn up to Kshs. 500/- per day which translated to approximately Kshs.10,000/- to 15,000/-. What did the trial court rely on to draw this conclusion? It believed the evidence of **PW 1 EVERLINE MUKHWANA OMBOKA** (the deceased's wife) who stated that her husband told her he was earning Kshs 500/- although she had nothing to support this assertion. The respondent's counsel further argued in this appeal that since the appellants failed to honor the notice to produce documents in relation to the deceased's earnings, then it was only fair to give the respondent the benefit of believing what was offered.

14. I do not think a witness should just be allowed to pluck figures from the abacus and wave them to the court without even laying a basis for those figures. The argument presented by the appellants is that in the absence of any record to support the deceased's earnings the court would fall back onto the **REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2013** to calculate the deceased's earnings. The order provides that for casual labourers in all other areas apart from cities and municipalities the statutory minimum wage is Kshs. 5218/- which ought to have been the multiplicand used. This would result in the sum being worked out as follows:

18 x 5218 x 12 x 2/3= Kshs. 751,392/-

15. I am of the view that once the appellant failed to honour the notice to produce; and the respondent did not have any basis upon which to stake the figure of Kshs 500/- as daily earnings, then the best guide was the statutory minimum wage. I do not agree with the trial magistrate that the deceased fell in the category of workers within a municipality as Ndhiwa is a sub-county. The orally plucked figure did not fit in with what is contemplated under section 69 of the Evidence Act as secondary evidence.

16. To that extent then the trial magistrate relied on an erroneous principle in awarding loss of dependency in the sum of Kshs. 1,800,000/- based on a multiplicand of Ksh 12,500/-. I therefore set aside the award under that head and accept the calculations suggested by the appellant, being Kshs 751,393/-

17. The appellant's counsel has also argued that the trial court erred in awarding damages under both the Law Reform Act and the Fatal Accidents Act, because under section 4 (1) of the Fatal Accidents Act, if the dependants are the same under both Acts, then the sum awarded under Law Reform Act should be deducted from what is awarded under the **Fatal Accidents Act. Section 4 (1)** provides as follows:-

“4 (1) An action under this Act shall be brought for the benefit of any person who is the wife, husband, parent or child of the deceased or who is, or is the issue of, a brother, sister, uncle or

aunt of the deceased person.”

18. The respondent had listed the parent, spouse and children of the deceased as dependants. I concur with the appellant’s counsel that they fall under the same category of dependants addressed by section 4 (1) cited above. In the case of **HELLEN WARUGURU** (Suing as the legal representative of **PETER WAWERU MWENJA (DECEASED)**) Vs **KIARIE SHOE STORES LTD (NYERI CA CIVIL APPEAL NO 22 OF 2014** it was 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 under the Law Reform Act and the Dependants under the Fatal Accidents Act are the same, consequently the claim of lost years and dependency will go to the same persons. It does not mean that the 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”.

19. It therefore follows that the sum of Kshs 90,000/- awarded under the head of pain and suffering, ought to be deducted from the sum awarded under the Fatal Accidents Act to give a net figure of Kshs. 661,392/- worked out as follows:-

751,392 – 90,000= 661,392.00

20. To that extent then the appeal succeeds and costs of the appeal are awarded to the appellant

Delivered and dated this 25th day of July, 2017 at Homa Bay

H.A.OMONDI

JUDGE