



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.468 OF 2009

POLYPHASE SYSTEMS LIMITED.....APPELLANT

- V E R S U S -

NEHEMINAH NYANGERI

ORWONGO (representative of the estate of JOSHUA

MOCHOBერი NYANGERI (Deceased).....RESPONDENT

(Being an appeal from the judgement of Hon. R. N. Kimingi (Mrs)Senior

Principal Magistrate delivered on 31st July 2009 in Civil Suit no. 5589 of 2005)

JUDGEMENT

1) Nehemiah NyangeriOrwongo the respondent herein (suing as the legal representative of the Estate of Joshua MochoberiNyangeri (deceased), filed a compensatory suit at the Chief Magistrate's court at Nairobi, Milimani Commercial Courts against Polyphase Systems Limited the appellant herein, for the fatal injuries the deceased suffered as a result of work related accident at the appellants company, where the deceased was employed on 25th May, 2002.

2) It is said that on or about the 25th May 2002, the deceased while working at the construction site of Gianchore Tea Factory , in Nyamira District, he fell on the ground and sustained fatal injuries. In the end, Hon. R. N. Kimingi, the learned chief magistrate found the appellant wholly to blame for the accident and eventually gave judgment in favour of the respondent in the following terms:

<i>General damages for pain and suffering</i>	<i>50,000/=</i>
<i>Loss of expectation of life</i>	<i>100,000/=</i>
<i>Loss of dependency</i>	<i>400,000/=</i>
<i>(5000x20x12x1/3)</i>	<i>550,000/=</i>
<i>Special damages</i>	<i>2,186/=</i>
<i>Total</i>	<i>552,186/=</i>

Interests on 1 and 2 above plus costs of the suit.

3) Being aggrieved, the appellant preferred this appeal and put forward the following grounds in its memorandum of appeal;

1. The learned magistrate misdirected herself and erred in law by not holding the deceased liable in contributory negligence.

2. The learned magistrate erred in law and in fact in making an award which was manifestly high.

3. The learned magistrate erred in law and in fact in not appreciating and/or considering that the only dependant under to fatal accident was 88 years old and adopted a manifestly high and unjust multiplier.

4. The learned magistrate awarded a high award under the head of pain and suffering considering the fact that the death in this case was instantaneous and only a nominal sum ought to have been awarded.

5. The learned magistrate misdirected herself by ignoring well settled legal authorities cited by counsel for the appellant in his submissions which demonstrated the range of awards made by the High Court in fatal claims under similar circumstances.

5A. Damages under the Fatal Accidents Act and Law Reform Act merge and the learned magistrate erred in granting damages under both the Acts.

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submission. Though the appellant put forward a total of 5 grounds the issues raised revolve around the challenge of liability and quantum.

5) On liability, the trial magistrate found the appellant wholly to blame. The rival submissions on record have no content on liability. I will leave the apportionment as it is. The parties seem not to have an issue with it as was awarded. The appeal does not challenge on liability therefore this court will not determine the issue.

6) On quantum, the appellant submits that the multiplier of 20 years as held by the learned magistrate was erroneous and a multiplier of 10 years should have been used instead. It is the appellant's submission that the deceased dependant (the father aged 88 years) with the multiplier of 20, would take the father of the deceased to the age of 108 years. The appellant cited the case of **Civil Appeal NO. 1013 of 2008 Polyphase System Ltd –vs- Joseph Ngumo Thuo**, where the trial magistrate had awarded a multiplier of 25 years to parents of the deceased who were 74 and 68 years, was overruled on appeal and reduced to a multiplier of 10 years. The appellant proposes a multiplier of 5 years, monthly salary of kshs.5,000/= and 1/3 dependency ratio computed as follows:

$5000 \times 5 \times 12 \times 1/3 = \text{ksh.}100,000/=$

7) The respondent on the other had submits that there was no error of principle or practice in applying a multiplier of 20 years and cited the case of **Elijah ole Kool –vs- George Ikoyina Thuo, H.C.C.C. No 1299 of 1998** where a multiplier of 20 years was used.

8) The deceased was 28 years at the time of death as per the death certificate produced, earning kshs.5,355.60 per month as per the evidence of Nehemiah Nyangei Orwongo, PW1 evidence (who is the deceased brother). The trial magistrate considered only the deceased father as dependant and excluded the two other proposed dependants of 34 years and above (who are brothers to the deceased). A multiplier of 20 years was applied as follows $5000 \times 12 \times 20 \times 1/3 = \text{ksh.}400,000/=$ as the amount for loss of expectation of life. I find the multiplier applied appropriate. I think the award is reasonable.

9) The respondent was not satisfied with the award on special damages awarded and submits that the total prayed was ksh.30,986/= and it was not contended, and therefore should have been awarded. The trial magistrate awarded kshs.2,180/= and struck out the rest of the receipts for not having stamp duty stamp. Special damages have to be specifically pleaded and proven and that was the basis for allowing the sum of ks.2,180/= and not kshs.30,986/=. The finding of the trial magistrate cannot be faulted, the amount awarded was pleaded and proved. The appellant did not submit on special damages.

10) In the end and on the basis of the above reasons, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent