REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 44 OF 2015

FORMERLY NAKURU HCCA NO. 44 OF 2013

(Being an appeal from a Judgment of the CM'S Court Naivasha by E. Boke (PM) in Civil Case No. 512 of 2008)

KENYA PIPELINE COMPANY LIMITED ……..……..APPELLANT

-VERSUS-

LUCY NJOKI NJURU

(*Suing as the legal representative of the Estate of*

JOHN WAMAE (DECEASED)…….…….....RESPONDENT

J U D G M E N T

1. This appeal emanates from the judgment of Hon. E. Boke (PM) in Naivasha PMCC 512 of 2008 Lucy Njoki Njuru (Suing as the representative of the Estate of John Wamae (Deceased). The suit was an accident compensation claim brought under the Law Reform Act and Fatal Accidents Act. The Plaintiff in the lower court brought the suit in her capacity as the administrator of the estate of the deceased John Wamae, for her own benefit and for the benefit of, the deceased's widow **Catherine Wanjiru** and the deceased's minor daughter, **Lucy Njoki Wamae.**

2. The deceased had suffered fatal injuries following a collision of two vehicles namely, KAV 228E owned by the defendant and a vehicle KAK 216Y owned by a third party. The accident occurred along Maai Mahiu-Narok road on 12th June, 2008. The deceased was in the latter vehicle. Negligence had been pleaded against the Defendant's driver. The Defendants filed a defence denying liability. However on 30th January 2013 the parties recorded a consent order adopting the judgment in the test suit **PMCC 399 of 2008 Patrick Kihero –Vs- Kenya Pipeline Limited**, where the Defendant had been found 100% liable for negligence. The suit against the 3rd party had been dismissed. The instant matter subsequently proceeded for proof of damages.

3. Two witnesses testified for the Plaintiff but the Defendant did not adduce any evidence. PW1 was the Plaintiff herself. Her witness was **Joseph Githumbe** (PW2). On 3rd April 2013 judgment was entered for the Plaintiff in the Sum of Shs 3,080,500/= with costs and interest. Aggrieved by the decision the Defendant filed this appeal. The Memorandum of Appeal to this court contains 10 grounds of appeal primarily challenging assessment of damages under the various claim heads. The parties to the appeal

agreed to canvass the appeal by way of written submissions which have now been filed.

4. The Appellant's submissions primarily argued grounds 1, 2, 3, 4, 6, 8 and 9 which are to effect:

> **"1. THAT learned Trial Magistrate erred in Law and in fact in awarding Kshs 20,000/= as general damages of pain and suffering when no such proof/or evidence was produced in court.**
>
> **2. THAT learned Trial Magistrate erred in Law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at a figure so inordinately high as to represent an entire erroneous estimate.**
>
> **3. THAT the learned Trial Magistrate erred in law and in fact in applying an excessive multiplier and multiplicand in the circumstances.**
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> **4. As (3) above. (sic)**
>
> **6. THAT learned Trial Magistrate erred in Law and in fact in making an award of damages of Kshs 2,880,000/= as loss of dependency when no such proof/or evidence of deceased's income was tendered and/or alluded to at the hearing of the suit."**
>
> **8. THAT learned Trial Magistrate erred in Law and in fact in by failing to weigh all the evidence placed before her before assessing damages.**
>
> **9. THAT learned Trial Magistrate erred in Law and in fact by relying on insufficient evidence."**

5. On the first ground, the Appellant contends that the award of Shs 20,000/= as damages for pain and suffering was not merited as the deceased had died instantly as in the case of **Richard Chege Ng'ang'a - Vs- Solomon Kiromo Mbodo NRB HCC 4049 of 1990,** where a sum of Shs 5,000/= was awarded in damages. The remainder of the grounds canvassed in the submissions were argued together.

6. The Appellant took issue with the multiplier used in assessing damages for lost dependency. It was the Appellants position that while they did not contest the multiplier of 24 years, they were opposed to the multiplicand of an assumed income of Shs 15,000/= per month. To the Appellant's the figure was not proved and the court erred in the circumstances by failing to adopt "a conventional figure" or to rely on the minimum wage guidelines under the Labour Institutions Act.

7. Citing the Regulations of Wages (Agricultural Industry) (Amendment) order, 2009, the Appellant argued that a sum of Shs 3,000/= per month was the appropriate wage for an unskilled labour in the material period. The Appellant did not contest the multiplier of 24 years adopted by the court as well as the dependency ratio of two third (2/3). Further, the Appellant submitted, on the authority **of NRB Civil Appeal No. 14 of 1989 Maina Kaniaru –Vs- Josephat Muriuki** and **Kemfro Africa Ltd T/A Meru Express Service –Vs- Lubia & Another [1987] KLR 30** that any sums awarded to the estate of the deceased in this case under the Law Reform Act ought to be deducted from the awarded damages for lost dependency.

8. For her part, the Respondent vigorously opposed the appeal. On the question of damages for pain and suffering, the Respondent reiterated the lower court's finding that the authority tendered by the Appellant on this score was over 20 years old. They submitted that the award of Shs 20,000/= was reasonable in light of inflationary trends since the authority. Several authorities were cited by the Respondent in defence of the award under consideration.

9. Regarding damages for lost dependency, the Respondent contests the multiplier suggested asserting that in the lower court Shs 5,000/= was offered by the Appellant who now offers Shs 3,000/= as the alleged minimum wage of an unskilled labourer. The Respondents urged the court to reject the

Appellant's attempt to canvass on appeal a matter not argued at the trial. Three authorities including **Vidyarthi –Vs- Ram Rakha [1957] EA 529** and **Saggat –Vs- Algeredi [1961] EA 767** were relied on.

10. Reiterating the Respondents evidence of the deceased's income in the lower court, counsel for the Defendant defended the lower court's "finding of fact" that the deceased's income was Shs 15,000/= per month. He argued therefore that the trial court relied on evidence and legal authority and did not misapprehend the evidence or rely on irrelevant factors. Counsel cited several authorities affirming the proposition that a claim for lost dependency cannot be defeated merely because no education/training certificates or documentary proof of earnings is tendered (See for example, **Kisumu Civil Appeal Number 1677 of 2002 Jacob Ayiga Maruja & Another –Vs- Simeon Obayo [2005] eKLR (suing as the administrator of Thomas Ndaya Ohaya)**.

11. The Respondent opposed the Appellant's argument that the award made under the Law Reform Act ought to be deducted from the award under the Fatal Accidents Act. For two reasons, firstly, because the issue was not canvassed at the trial or included in the grounds of appeal. Secondly, the Respondents contend that the submission has no merit as there is no mandatory requirement for the court to make the deductions proposed but only to "take into account" any damages awarded under to the estate of the deceased while awarding damages under the Fatal Accidents Act. Several authorities including the case of **Kemfro Africa (Supra)** were cited on this score

12. I have considered the rival submissions of the parties in light of the judgment of the court, the pleadings and the proceedings of the trial court. In my considered view, two issues can be disposed of immediately, namely, whether or not the damages awarded in respect of pain and suffering were reasonable; and the application of alleged requirement for the court to deduct, in plain terms, sums awarded to the estate of the deceased from sums awarded for lost dependency.

13. On the first issue, the Appellants relied yet once more on an authority which the trial court rightly dismissed as too old. (**Richard Chege Nganga's case**). In her judgment the learned magistrate distinguished this case where the deceased died instantly from others cited by the Appellant which involved persons who had died on the way to hospital or several days later. She equally rejected the authority of **Richard Chege Nganga** as too old. Instead she relied on the case of **Eva Benta Okembo –Vs- Kimotho Kibira NRB HCCC 2399 of 1999** wherein, the deceased died instantly. She then proceeded to consider inflation over the years before awarding Shs 20,000/= in respect of the head under consideration. I can find no reason to fault this award. Indeed it is reasonable.

14. On the question of the proposed deductions, I agree entirely with the Respondent that the Appellant cannot raise it at this point, having failed to canvass it at the trial and in the grounds of appeal. I would go as far as agreeing with the persuasive authorities cited by the Respondent on this issue for the proposition that the Fatal Accidents Act requirement of the court is to "take into a court" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency. All the court is required to do is take into account such awards to the estate, clearly to obviate the making of excessive awards, or double payments.

15. The real sticking point in this appeal revolves around the multiplicand of Shs 15,000/= adopted in the judgment of the lower court. As stated in the **Kemfro Africa** case:-

> **"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

16. While affirming the court's jurisdiction on appeal to review the trial evidence, the court's language was rather emphatic in **Peter –Vs- Sunday [1958] EA 424 pg 429** by stating as follows:-

"It is a strong thing for an Appellate court to differ from the finding, on a question of fact, of a Judge who tried the case, and who has the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence……to determine whether the conclusion originally reached upon it should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

17. The appellate court's interference with regard to the quantum of damages, can only be justified where the trial court is found to have applied the wrong principles, for instance by taking irrelevant factors into account or ignoring relevant ones or by misapprehending the evidence thereby arriving at an erroneous estimate reflected in an inordinately high or low figure **(See The Catholic Diocese of Kisumu –Vs- Tete [2004] 2 KLR 55** and **Jabane –Vs- Olonya [1989] KLR 1**.

18. In the instant case, the trial magistrate was alive to the fact that the deceased's income could be deduced from other proven facts and not solely from documentary proof. (**See Jacob Ayuga Maruja case**). She considered the evidence of **PW1** and **PW2**, which was not controverted or for that matter, seriously challenged during cross-examination. She was hesitant to accept that the deceased earned Shs 3,000/= per day. In her judgment she stated:

"I do not believe that he was earning Kshs 3,000/= or more per day but he was earning a living from the business which enable him to find for his family. I will therefore take KSsh 15,000/= per month as his earning because I find it a reasonable average from hawking business which I understand can fetch even more than that per month or less than that in some occasions per month" (sic).

19. Clearly the trial magistrate weighed, the evidence of **PW1** and **PW2** and made her own finding based on that evidence. I do not find any misdirection on her part, in so doing. She was entitled to make a deduction based on the deceased's proven occupation and family responsibilities.

20. The Defendants had in their submissions in the lower court proposed a sum of Shs 5,000/= as monthly income. They cannot be heard in this court to propose a sum of Shs 3,000/=. Nor canvass figures based on the gazetted minimum wage for an unskilled labourer which were not canvassed at the trial. The trial court found as a fact that the deceased was a hawker not an unskilled labourer. There was no justification therefore for the court to resort to the minimum wage reserved for unskilled labourers.

21. The trial magistrate handled the evidence before her with necessary circumspection, weighed it and eventually made a finding which she justified in her judgment. There is no demonstration that she applied wrong principles or misapprehend the evidence. I am not persuaded that the final award was inordinately high.

22. The quantification of the income of a deceased person in a case where no formal documentation exists will always pose a challenge. The court cannot merely abdicate its duty in such circumstances, but must do what is just and reasonable based on the available evidence. Hence in such cases, assessment cannot be a scientific or strictly mathematical exercise, but a mix of relevant factors including the evidence before the court and a bit of the judging skills of the trial magistrate, the latter which is inevitably shaped by her experiences and understanding of the locality in which the court is based.

23. In light of the foregoing, I am not persuaded that the trial magistrate misdirected herself. All in all, this appeal has no merit and is dismissed in its entirety with costs to the Respondent.

24. One matter however has caused me concern and I feel compelled to address it. The suit herein was principally prosecuted by the Respondent who is the mother of the deceased on her own behalf and on behalf of the widow and minor daughter of the deceased.

25. Section 4 (1) of the Fatal Accident's Act states:

"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

26. The trial court is under a duty to make apportionment of damages amongst the persons for whose benefit the action was instituted. In this case it is all the more important to do so in order to safeguard the best interest of the minor child of the deceased, as mandated by the provisions of Article 53 (2) of the Constitution, and secondly, to protect the interest of the widow, both who rank higher than the parent, in this case the Respondent.

27. I do therefore direct that a date be taken before Hon. P. Gesora (Chief Magistrate) so that parties can make representations as regards the fair apportionment of the award made by the court amongst the beneficiaries. I would expect the court to inquire into and make appropriate directions as to the reasonable investment of the share apportioned to the minor, for her future benefit.

Delivered and signed at Naivasha this **26th** day of **February**, **2016.**

In the presence of:

For the Appellant : N/A

For the Respondents : Mr. Wainaina for Respondent

Court Assistant : Stephen

C. W. MEOLI

JUDGE