



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 75 OF 2015

BETWEEN

MOMBASA MAIZE MILLERS LIMITED APPELLANT

AND

W I M suing as the representative

of J A M (DECEASED) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM at the Chief Magistrates Court at Kisumu in Civil Case No. 343 of 2014 dated 28th July 2015)

JUDGMENT

1. In the subordinate court, the respondent filed suit on behalf of the estate and dependants of J A M (“the deceased”) under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* claiming damages as a result of an accident which occurred on 3rd February 2012 along the Kakamega-Kisumu road resulting in the death of the deceased. At any rate, the issue of liability was not contested and was agreed at 70:30 in favour of the respondent. The matter proceeded for assessment of damages.

2. According to the plaint, at the time of death the deceased was aged 34 years old and gainfully employed by the [particulars withheld], Western Region as a Finance Officer where he was earning at least Kshs. 15,000/- monthly. The fact that the deceased was working with [particulars withheld] as the Assistant Finance Manager was confirmed by W I M (PW 1) who stated that he was earning Kshs. 13,500/- per month. In cross-examination, PW 1 told the court that although the deceased was not married, he had a four year old child by the name C.

3. Bearing the facts in mind, the learned magistrate made the following award;

Pain and Suffering	Kshs. 20,000/-
Loss of Dependency	
(10,000/- x 26x12x2/3)	Kshs. 2,080,000/-
Loss of Expectation of Life	Kshs. 100,000/-
Special Damages	Kshs. 29,000/-

TOTAL	Kshs. 2, 209,000/-
Less award for Loss of Expectation of Life	(Kshs. 100,000/-)
Less 30%	
GRAND TOTAL	Kshs. 1,476,300/-

4. The thrust of the grounds set out in the memorandum of appeal dated 15th August 2015 is that the learned magistrate proceeded on wrong principles when assessing damages and consequently, the damages were inordinately high thus representing an erroneous estimate of damages vis-à-vis the respondent's claim.

5. Mr Nyamweya, learned counsel for the appellant focused his submissions on two points. Firstly, he contended that the multiplier did not bear a rational relationship with the age of the deceased and the expected vagaries of life. He urged that a multiplier of 19 or 20 years be adopted. Secondly, he submitted that the multiplicand of Kshs, 10,000/- was unreasonable as there was no proof of income as the deceased was a mere volunteer. He urged that since the deceased work did not fall within any class defined by the **Regulation of Wages (General Amendment) Order, 2013** hence the bare minimum wage of Kshs. 5,000/- ought to have been used as the multiplicand.

6. Mr Abande, learned counsel for the respondent, supported the decision of the learned magistrate. He submitted that since the income was not proved, the applicable minimum wage under the **Regulation of Wages (General Amendment) Order, 2013** was Kshs. 10,000/- for the nature of work the deceased was doing. Counsel also contended that the multiplier applied was reasonable in light of the age of the deceased.

7. As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

8. Before the subordinate court the respondent the learned magistrate accepted the submission by the respondent that although the deceased was working for the R C S and earning about Kshs. 13,000/-, he did not prove income by documentary evidence hence it could be determined by reference to the **Regulation of Wages (General Amendment) Order, 2013**. Failure to produce documentation does not necessarily disentitle a party damages as the Court of Appeal noted in **Theta Tea Company Ltd & Another v Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002]eKLR** that;

[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors.

(see also **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR**).

9. withheld]. There was no suggestion that the deceased was a mere volunteer or doing the work of a general labourer which attracts the lowest wage. Since the income was not determined, then the court could fall back on the applicable **Regulation of Wages Order**. I find support for this proposition in **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J., stated, “*In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005*”

[Emphasis mine]. I therefore affirm the learned magistrate's finding on this point.

10. In **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** the Court of Appeal stated that, "*The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.*" In this case the learned magistrate reasoned that the deceased, who was 34 years old, "[C]ould have lived to the retirement age if it were not for the accident. There are also the vagaries of life." She awarded a multiplier of 26 years implying that the deceased could have worked until he was 60 years old. Obviously, the court did not take into account the vagaries and imponderables and the reasonable life expectancy of a Kenyan man. I hold that this was an error of principle and I reduce the multiplier to 20 years.

11. In the judgment, the learned magistrate deducted the sum awarded for loss of expectation of life under the **Law Reform Act** on the basis of the principle of duplication of awards. This approach was erroneous and I would do note better than quote what the Court of Appeal stated in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** that;

*[20] 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 dependants under the **Fatal Accidents Act** are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a 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.*

Nothing turns on this point as the respondent did not cross-appeal against this finding.

12. I would therefore set aside the judgment to the extent I have stated and find the amount due under the **Fatal Accidents Act** is **Kshs. 1,600,000/-** made up as follows (Kshs. 10,000/- x 20 x 12 x 2/3). The total award less contribution is therefore **Kshs. 1,084,300/-**.

13. Before I conclude this judgment, I turn to an issue that has caused me grave anxiety in so far as the issue were not raised in the court below and on this appeal. The proceedings in the subordinate court were brought on behalf of the deceased's brothers. The deceased was not married but PW 1 disclosed that he had one son by the name **C**. The dependants contemplated under the **Fatal Accidents Act** are expressly defined under **section 4(1)** as follows;

Every action brought by nature 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....be brought by and in the name of the execution or administrator of the person deceased].....
[Emphasis mine]

The brothers of the deceased are not dependants for purposes of the **Fatal Accidents Act** and are therefore not entitled to the proceeds of the judgment and any award to them would definitely prejudice the deceased's child's entitlement.

14. Since a child the primary beneficiary of the judgment is a child of the deceased, the guiding principle in this case is to be found at **Article 53(2)** of the Constitution and it is that, "*A child's best interests are of paramount importance in every matter concerning the child.*" This principle is reinforced by the **Children Act (No. 8 of 2001)** and in particular **section 4** thereof, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law or any other institutions, the paramount consideration shall be the best interest of the child. What amounts to the best interest of the child has not been defined by the law as best interest of a child will depend on the particular circumstances of each child.

15. Although, the law is clear, that the court should not consider a matter not raised by either parties either in the pleadings before the subordinate court or on this appeal, I am nevertheless compelled by the Constitution and the law I have cited to take into account the best interests of the child. A child has no capacity, in law or in fact, to agitate his father's claim hence relies on third parties to take steps to protect his interest. In this case, the respondent clearly did not have the best interests of the child at heart hence this court must intervene to protect those interests. My decision is further fortified by the fact that liability was admitted in subordinate court and the fact that the appellant conceded that the deceased's dependants were entitled to some form of damages, whose nature and extent was left for the court's determination.

16. As a child is a beneficiary, the court must ascertain this issue and also approve a scheme of investment. I therefore direct that the respondent to file the necessary application for consideration before this court in due course before the decretal sum is released to the respondent or his advocate.

17. Orders accordingly.

DATED and DELIVERED at KISUMU this 29th day of June 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Abande instructed by Abande and Company Advocates for the respondent.