



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 27 OF 2014

LUKA KIPKOECH CHERUTICH

JACKSON KIPTOO..... APPELLANTS

VERSUS

JAMES AKENGA ETABALE (Legal representative & Administrator of the estate of

FRED AKENGA deceased..... RESPONDENT

RULING

1. This appeal arises from the judgment of the chief magistrate at Kitale in Kitale CMCC No.225 of 2011, in which the appellant, Luka Kipoech Cherutich and Jackson Kiptoo, had been sued by the respondent, James Akenga Etabale, being the legal representative and administrator of the estate of Fred Akenga (deceased), for damages arising from a road traffic accident which occurred on 10th February, 2011 along the Kitale Eldoret Road in which the appellants' motor vehicle Reg. No.KBA.561t Mitsubishi Lorry knocked down the deceased thereby occasioning him fatal injuries.
2. It was pleaded that on that material date, the aforementioned motor vehicle belonging to the second appellant and driven at the time by the first appellant was so negligently and recklessly driven and / or controlled such that it violently hit and caused the deceased fatal injuries.

The respondent therefore prayed for damages against the appellant under the Law Reform and Fatal Accidents Act together with special damage and costs of the suit.

The appellants filed a statement of defence in which they denied liability and contended that if the accident occurred, that it was solely caused or contributed to by the negligence of the deceased. The appellant therefore prayed for the dismissal of the suit.

3. Judgment on liability was entered by consent of both parties in favour of the respondent against the appellants at the ration of 80:20.

This appeal is therefore on quantum of damages in which the respondent was awarded a total of ksh. 810,350/= being loss of dependency at Kshs.640,000/= loss of expectation of life at kshs.80,000/= and special damages at Kshs.80,350/= together with Kshs.10,000/= for pain and suffering.

4. Being dissatisfied with the award, the appellant filed this appeal on the basis of the grounds in the memorandum of appeal dated 14th August 2013.

Written submissions in support of the appeal were filed by the appellants through *Messrs Kamau Lagat*

& Company Advocates.

The respondent opposed the appeal through the learned counsel, Mr. Benja, who orally submitted that there is no sufficient cause to alter the decision of the lower court as liability was settled and the deceased died at the age of twenty four (24) years. That, the multiple and the multiplier applied by the learned trial magistrate was correct given that the current minimum wage rate is Kshs11,000/=. That, the rate of kshs.8,000/= applied by the lower court was reasonable considering that the judgment was delivered one and a half years ago.

5. After due consideration of the submissions by both sides, it may first be noted that the principles to be observed by an appellate court is deciding whether it is justified in discussing

the quantum of damages awarded by a trial court were clearly laid down in the case of ***Kemfro African Ltd t/a Meru Express Service vs A. M. Lubia & Another (1982-88) 1KAR 727***. thus, the appellant court must be satisfied that either the trial court in assessing damages took into account an irrelevant factor left out of account a relevant one or that; short of this, the amount is so in ordinarily low or so in-ordinarily high that it must be a wholly erroneous estimate of the damage. (*see also, Arrow Car Ltd vs Bimomo & others (2004) 2 KLR.101*)

6. Applying these principles to the present case and special regard being given to the damages awarded for loss of dependency under the Fatal Accident Act; this court sees no good reason to interfere with the award made by the trial court under that head. It was not disputed that the deceased died at a fairly young age of twenty four (24) years. He earned his income as a mason and although he was not married, he left behind his parents and siblings. Other than the parents, no other person depended on his earnings as indicated by the file (PW1) in his evidence.
7. It was also indicated by the plaintiff that the deceased was permanently employed as a mason earning a monthly salary of between Kshs.6,000/= and Kshs.7,000/= per month. No tangible evidence was however availed to establish the said earnings. Therefore, it was perfectly in order for the learned trial magistrate to apply a multiplicand of Kshs.8,000/= based on the applicable minimum wage rate for skilled workers.

Indeed , being a mason, the deceased was a skilled rather than unskilled employee and given the prospects of promotion and the expectation of working life and significantly, the current higher minimum wage ratio set by the Government, the multiplicand of Kshs.8,000/= was fairly reasonable then and now.

8. With regard to the awards made under the Law Reform Act 1.0 loss of expectation of life and pain and sufferings, there were not contested in the appeal and will remain as assessed by the learned trial magistrate. However, under ground five (5) of the appeal grounds, the appellants opine that the learned trial magistrate did not discount the award made under the Law Reform Act and therefore ended up making double awards to the respondent

In that regard, it was submitted on the basis of the decision in the ***Kemfro African Ltd Case (supra)*** that where the benefits will be inherited by the same Dependants, a deceased estate should not benefit twice from a single transaction by award of damages under both the Law Reform and Fatal Accident Acts.

9. Indeed, it is a principle of law to avoid double benefits in favour of one claimant (*see also, Zipporah Kanini vs Harun Muriuki (2011) e KLR*).

However, there was herein no substantial evidence to show that damages under both the Law Reform Act and Fatal Accidents Act would solely go to the respondent. In any event, under s.2(5) of the law Reform Act, damages under the Act are in addition to those made under the Fatal Accidents Act. It is therefore not necessary for this learned trial magistrate to discount from the total award, the award made under the Law Reform Act.

10. All in all, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

J. R. KARANJA

JUDGE

26.5.2015

Delivered and signed this 26th day of May 2015 in the presence of Mr. Maina for Kamau Lagat & Co. for appellant and Mr. Benja for Respondent.

J. R. KARANJA

JUDGE