



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 1 OF 2015**

**BETWEEN**

**SUKARI INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**JOHN OSODO OSEE suing as the administrators of the  
estate of WYCLIFFE OUMA OSODO (Deceased) .....RESPONDENT**

**AND**

***(Being an appeal from the Judgment and Decree of Hon. B. R. Kipyegon, RM in Principal  
Magistrates Court at Ndhiwa in Civil Case No. 4 of 2014 dated 10<sup>th</sup> December 2014)***

**JUDGMENT**

1. The respondent, as personal representative and administrator of the estate of the deceased, filed the suit against the appellant seeking compensation for an industrial accident that occurred on 28<sup>th</sup> August 2013. On that day the deceased was working as a casual worker for the appellant collecting and loading sugarcane when the appellant's employee negligently reversed the bell loader, hitting the deceased and causing him to suffer fatal injuries. Ultimately, the issue of liability was settled by consent of the parties with the respondent bearing 20% and the appellant 80%.

2. The matter proceeded for assessment of damages and the trial court awarded a net amount of **Kshs. 1,020,000/-** made the following award;

***Damages under the Law Reform Act (Chapter 26 of the Laws of Kenya)***

a) Pain and suffering Kshs. 50,000/-

b) Loss of expectation of life Kshs. 100,000/-

***Damages under the Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***

Lost Years/earnings Kshs. 1,275,000/-

3. The appellant appeals against the judgment on the grounds set out in the memorandum of appeal filed on 9<sup>th</sup> January 2015. In summary the appellant contends that learned magistrate did not take into account the totality of the evidence, that he proceeded on wrong principles in awarding damages and that in the

circumstances the award was inordinately high so as to represent an entirely erroneous estimate vis-à-vis the respondent's claim.

4. Counsel for the appellant, Mr Maganda, submitted that the learned magistrate made a duplicated the awards under the **Law Reform Act** and the **Fatal Accidents Act** hence the awards made under the **Law Reform Act** should be set aside. He further submitted that the dependency ratio of  $\frac{3}{4}$  was too high as the deceased was single and had no dependants. He further contended that the deceased earnings were not proved hence the award was inordinately high.

5. Counsel for the respondent, Ms Kuke, conceded that awards under the **Law Reform Act** were duplicated. She however supported the findings of the learned magistrate and urged that the decision was based on sound principles and appreciation of the facts before the court. She contended that the deceased was an employee of the appellant hence it could not deny he was earning an income.

6. As this is an appeal on quantum of damages, 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, erred in principle and 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**.

7. According to the pleadings, the case against the appellant was grounded on both the **Law Reform Act** and the **Fatal Accidents Act**. From the decision of the learned magistrate, he seemed to conflate the award for lost years under the **Law Reform Act** and an award for loss of dependency under the **Fatal Accidents Act**. In assessing and ultimately awarding damages, the learned magistrate was alive to the fact that the claim was for loss of dependency under the **Fatal Accidents Act**. Indeed the tenor of the respondent's evidence suggests as much.

8. Damages for lost years under the **Law Reform Act** are recoverable for the estate of the deceased where the deceased died before he could institute an action. Under **section 2(5)** of the **Act** such damages are recoverable for the benefit of the estate and are in addition to any rights conferred on dependants of the deceased by the **Fatal Accidents Act**. A claim under the **Fatal Accidents Act** is made by the dependants of the deceased who claim for loss of the support the deceased during his lifetime.

9. Although the principles of assessment are similar, the court cannot make an award for lost years and loss of dependency as the benefits would ultimately devolve to the same parties under both Acts and this would amount to double compensation. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** as follows;

*[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.*

10. The principal 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 regarding that aspect of the award. In this instance therefore I will not disturb the award to that extent. I will also not disturb the multiplier of 25 years applied by the learned magistrate as there was no dispute on that front.

11. It is clear from the evidence that the deceased's parents were making a claim for loss of dependency of their son who used to support them under the **Fatal Accidents Act**. The manner of assessment of damages under the **Act** was succinctly put by Ringera J., in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where he stated as follows;

*The principles applicable to an assessment of damages under the Fatal Accidents Act are all too*

*clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.*

12. According to the pleadings, John Osodo Osee (PW 1) and Phoebe Aoko Asino were the parents of the deceased. At the time of his death the deceased was in good health and was aged 33 years earning approximately Kshs. 20,000/- from his job and farming work. PW 1 testified that the deceased was working with the appellant where he would earn about Kshs. 9,000/- and that he was also a *boda boda* operator where he could get Kshs. 20,000/- per month. The deceased by the time of his death was not yet married.

13. In computing the multiplicand the learned magistrate adopted a figure of Kshs. 5,000/- per month. The appellant cannot be heard to say that the deceased was not earning as he was employed by it and his income was a matter peculiarly within its knowledge. There was no cross-appeal on the issue income by the respondent hence I find the deceased income was Kshs. 5,000/-.

14. Determination of the dependency ratio is a question of fact. In ***Boru v Onduu* [1982–1988] KAR 299**, the Court of Appeal stated that;

*The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle in such a situation.*

15. While the evidence is that the deceased did not have a wife and children, it does not mean that he did not support his parents. The fact that African children support their parents had been recognised by our courts (see ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1985] 4 KCA 217**). In this case there is evidence that PW 1 was a farmer and a mason doing casual jobs which means he supported himself although he would expect that the deceased would continue to support him. In the circumstances, I find that a dependency ratio of 1/3 appropriate.

16. On the whole therefore, I find that the learned magistrate failed to appreciate that the claim was one for loss of dependency under the ***Fatal Accidents Act*** and assess the damages accordingly. As this is an error of principle, this court is entitled to intervene. The award thereunder is therefore set aside and substituted with an award of Kshs. 500,000/- made up as follows; **Kshs. 5,000 x 1/3 x 25 x 12 = Kshs. 500,000/-**

17. The final award in favour of the respondent shall be as follows;

Pain and Suffering	Kshs. 50,000/-
Loss of Expectation of Life	Kshs. 100,000/-
Loss of Dependency	Kshs. 500,000/-
Total	Kshs. 650,000/-
Less 20% liability	(Kshs. 130,000/-)
<b>Grand Total</b>	<b>Kshs. 520,000/-</b>

18. The sum shall accrue interest from the date of judgment in the subordinate court. The respondent shall have the costs of the suit in the subordinate court while the appellant shall have 1/3 of the costs of the appeal.

**DATED and DELIVERED at HOMA BAY this 31<sup>st</sup> day of July 2015.**

**D.S. MAJANJA**

**JUDGE**

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

Ms Kuke instructed by Kuke and Company Advocates for the respondent.