



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 225 OF 2012

KENYA KAZI SERVICES LIMITED.....1ST APPELLANT

K. K. LODGIT GUARDS.....2ND APPELLANT

-VERSUS-

MARGARET WANJIRU MAINA (suing as the

Legal Representative of the Estate of the late

JOSEPH MAINA MWANGI).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. M. Githinji, Chief Magistrate

delivered on 20th December, 2012 in Naivasha CMCC NO. 820 OF 2010)

JUDGMENT

FACTS

1. This appeal emanated from the decision of the Chief Magistrate, Naivasha, in which he entered judgment in favour of the Respondent herein, who had sued the Appellants for damages arising out of a Fatal Accidents Claim.

2. The parties recorded a consent on liability on a ratio of 80:20 basis in favour of the Respondent. They then proceeded with the hearing on assessment of damages.

3. Judgment on quantum was delivered upon the following terms:

- i) Loss of expectation of life - Kshs.60,000.00
- ii) Loss of dependency - Kshs.1,075,200.00
- iii) Pain and Suffering - Kshs.24,000.00
- iv) Special Damages- Kshs.325,000.00 less 20% =Kshs.260,000.00

4. The above sums reflect the net amount after apportionment.

5. Being aggrieved by the judgment of the court, the Appellants filed a Memorandum of Appeal and listed five (5) grounds of appeal. The grounds of appeal are *inter alias*:

i. **THAT** the Learned Magistrate erred in Law and in fact in assessing damages at Kshs.1,419,200/= in total disregard of the evidence and testimony adduced in court thereby arriving at a wrong conclusion.

ii. **THAT** the Learned Magistrate erred in Law and in fact by failing to consider the evidence, submissions and proceedings in entirety on the issue of quantum and thereby arriving at a wrong conclusion.

iii. **THAT** the Learned Magistrate erred in Law and in fact by mis-directing himself and acting on a wrong principal of Law.

iv. **THAT** the Learned Magistrate erred in Law and in fact in awarding special damages at Kshs.260,000/= contrary to the pleadings and evidence before court.

v. **THAT** the Learned Magistrate mis-appreciated the pleadings by the parties and evidence before him and reached a wrong conclusion of Law.

ISSUES FOR DETERMINATION

6. The Appellants issues for determination relate to:

i) the amount awarded for special damages

ii) the amount awarded as quantum of damages

ANALYSIS

7. The test on whether an Appellate Court should disturb an award for damages is set out in the renowned case of **Butt V. Khan**, [1977] 1KAR where it was held by Law, J.A.:

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either in inordinately high or low.”

8. Similarly, the Court of Appeal in **Kemfro Africa Limited t/a Meru Express Service & Another V. V. A. M. Lubia & Olive Lubia**, (1982-1988) 1KAR 727 held that:

“An appellate court can only interfere with the quantum of damages awarded by a trial judge, where it is satisfied that the Judge assessing took into account an irrelevant factor or left out of account a relevant factor or that the amount awarded is inordinately low or so high that it must be a wholly erroneous estimate of the damages.....”

9. The principles having been clearly set down and articulated in the aforementioned cases, I shall now proceed to address the different sets of awards made by the trial court.

10. **Loss of Dependency under the Fatal Accidents Act.** The issue in contention is the lack of proof of income. It is evident that the deceased was a driver. The motor vehicle he was driving at the time of the accident was a matatu (Refer to the Accident Abstract). The Respondent gave contradictory evidence as to what the deceased's salary was at the time he met his death.

11. I concur with the Appellants' submissions that the trial magistrate took into account wrong factors when he decided to use the sum of Kshs.24,000/= as a multiplicand despite the fact that no evidence had

been tendered in support. The respondent ought to have tendered evidence from the deceased's employer to prove the deceased's salary or in the alternative the said employer ought to have been called as a witness.

12. The upshot is, that the Respondent failed to prove the deceased's income. In such situations the practice is to then apply the government minimum wage – that was applicable at the time of the accident.

13. In this instance, the accident occurred in the year 2010 and the minimum wage applicable, then is as set out in the Legal Notice No.97 of 2010.

14. It is interesting to note that it was the Respondent's Advocate who tendered this Legal Notice into court, annexing it to their submissions. This can be equated to conceding to this ground of appeal.

15. Upon having perused the Legal Notice, I concur with the Respondents' Advocate's submissions that the sum applicable should be Kshs.9,380/= which was the wage for a driver of a medium sized motor vehicle, like a matatu.

16. I shall therefore proceed to substitute the multiplicand of Kshs.24,000/= with that of Kshs.9,380/=.

17. I find no reason to interfere with the multiplier and dependency ratio applied by the trial court as the same is reasonable.

18. The tabulation for loss of dependancy works out as follows:

$$9,380 \times 7 \times 12 \times 2/3 = \text{Kshs.}525,280/=$$

$$525,280 \times 20\% \text{ contributory negligence} = \text{Kshs.}420,224/=$$

19. This ground of appeal is allowed and I hereby substitute the trial court's award under this head with the sum of Kshs.420,224/=.

SPECIAL DAMAGES:

20. It is trite law that special damages must not only be pleaded but also proved. It is noted from perusal of the plaint that the amount pleaded under this head is in the total sum of Kshs.325,000/=.

21. From the receipts tendered and produced at the trial by the Respondent, the following are not contentious and were proved:

i) For obtaining Letter of Administrative – Kshs.25,000/=

ii) Kenyatta National Hospital –Kshs.3,700/=

22. The fact that the deceased was admitted at Kijabe Hospital is a fact that is not disputed. The amount in contention is what was expended at Kijabe Hospital.

23. These costs have been clearly laid out in the two Invoices produced as “**Exb 2 and Exb 3** which amount is in the total sum of Kshs.247,076/92.

24. The Appellants submissions in the trial court was to the effect that Invoices are not payments but are mere billings and that payments made can only be confirmed by receipts.

25. The trial magistrate's interpretation when admitting the amount set out in the invoices is as set out hereunder; and I quote:

“That an invoice shows the actual amount that has been incurred on treatment and which

ought to be paid whether paid or not.....”

26. On appeal, the Appellant appears to have had a change of heart and opted to adopt the trial magistrate's finding on the medical expenses raised in the Invoices.

27. The Appellant proposed in their submissions that the sum of Kshs.202,442/89 be considered as the expenses incurred at Kijabe Hospital.

28. This then amounts to a concession on the part of the Appellant on this ground of appeal. The court will thus proceed to adopt it.

29. The tabulation for special damages is as set out hereunder:

i) Letters of Administration	- Kshs.25,000.00
ii) Kenyatta National Hospital	- Kshs.3,700.00
iii) Kijabe Hospital	- Kshs. <u>247,076.92</u>
Sub-total	275,776.92
Less 20%	<u>55,155.38</u>
Total	Kshs.<u>220,621.54</u>

30. I shall therefore substitute the award of the trial court of Kshs.325,000/= with the sum of Kshs.220,622/=.

DAMAGES UNDER THE LAW REFORM ACT

31. The principles as explained in the case of **Kemfro V. A. M. Lubia and Another** (supra) is that the amount awarded for loss of expectation of life and for pain and suffering ought to be deducted from the award made under the Fatal Accidents Act on the grounds that same amounts to duplication of awards as the beneficiaries under the **LAW REFORM ACT** and **FATAL ACCIDENTS ACT** are the same.

32. I shall not interfere with the awards under this head as the Appellant did not list it in the grounds of appeal.

DETERMINATION

33. For the reasons set out above the appeal is hereby allowed.

34. The judgment of the subordinate court is hereby set aside and substituted with the amounts hereunder which have been subjected to contributory negligence:

i) Loss of dependency	- Kshs.420,224.00
ii) Special damages	- Kshs.220,622.00
iii) Loss of expectation of life	- Kshs.60,000.00
iv) Pain & Suffering	- Kshs. <u>24,000.00</u>
Total	- Kshs,<u>724,846.00</u>

35. Interest shall accrue from the date of the subordinate court's judgment.

36. The Respondents are directed to make the necessary application before the subordinate court for apportionment of the award to the dependants.

37. The Appellant shall have costs of this appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 17th November, 2014.

A. MSHILA

JUDGE