



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 58 of 2010

KIARIE SHOE STORES LTD.....APPELLANT

VERSUS

HELLEN WARUGURU WAWERU

Suing as Legal Representative of the

Estate of PETER WAWERU MWENJA (Deceased).....RESPONDENT

(Being an Appeal from the Decree emanating from the Judgment of the M. WACHIRA Chief Embu in CMCC No. 139 of 2009 on 8/6/2010)

J U D G M E N T

The appellant was the defendant in the Chief Magistrate's Civil case No. 139/09. It was aggrieved by the Chief Magistrate's judgment delivered on 8/6/2010 and has appealed against it raising the following grounds.

1. *The learned trial Magistrate erred in law and in fact in failing to adopt a multiplier of 1 year in light of the fact that the deceased was a teacher aged 54 years.*
2. *The learned trial Magistrate erred in law and in fact in adopting Kshs.39,683/= as the multiplicand.*
3. *The learned trial Magistrate erred in law and in fact in failing to take into account and exclude deductions such as NSSF, NHIF, PAYE, KNUT and transport allowances from the salary that the deceased used to earn.*
4. *The learned trial Magistrate erred in law and in fact in finding that the deceased used to make Kshs.200,000/= from horticulture despite the paucity of evidence to prove the same.*
5. *The learned trial Magistrate misdirected herself in law and in fact in not taking cognizance and applying the established principles in the award of general damages for loss of dependency under the Fatal Accidents Act.*
6. *The learned trial Magistrate erred in law and in fact in failing to take into account and deduct the award under the Law Reform Act from the award under Fatal Accidents Act.*
7. *The learned trial Magistrate failed to appreciate the totality of the evidence before her and in not considering the submissions on behalf of them.*

Counsels for both parties agreed to dispose of the appeal by written submissions. Ms. Munene Wambugu for the appellant submitted on each of the grounds raised in the appeal. They submitted that the multiplier and multiplicand used by the learned trial Magistrate was not supported by the evidence on record. Secondly that there was no proof of the deceased's earnings from horticulture. The figure of

Shs.200,000/= was not supported by evidence.

There was no deduction of the Law Reform awards from the Fatal Accidents awards. They referred to the case of

1. ***KENFRO AFRICA LTD Trading as MERU EXPRESS SERVICES (1976) & ANOTHER VS LUBIA & ANOTHER 1982-88 1 KAR***
2. ***NAKURU HCC NO. 175/1997 SUSAN MWANGI VS KINYANJUI NGETHE & ANOTHER***

Mr. Mugambi for the Respondent submitted that they conceded to the appeal ONLY TO THE EXTENT that the learned trial Magistrate erred in law and in fact by failing to apply the known principles of assessment of damages under the Law Reform Act and Fatal Accidents Act. He asked the Court to re-assess the damages awardable afresh. But to consider that the deceased would still have worked even after the attainment of the age of 55 years.

This being a first appeal this Court is enjoined to reconsider and re-evaluate the evidence adduced and arrive at its own conclusion. In this I am guided by the case of ***SELLE VS ASSOCIATED MOTOR BOAT CO. LTD. [1968] EA 123.***

I am also alive to the fact that I did not see the witnesses. I therefore now proceed to evaluate the evidence adduced. On 30/3/2010 the parties entered a consent on liability in the ratio of 70:30 in favour of the plaintiff.

The Respondent is the only one who testified. She is the wife of the deceased. She had letters of administration (PEXB 2&3) and so was entitled to damages under both Acts. A payslip for August 2006 showed the deceased was aged 54 years. His gross pay was 39,633/= while the net was Shs.16,036/=.

They did farming in potatoes and tomatoes and he was a member of Kirinyaga District Farmers Sacco Society Ltd. They got Kshs.50,000/= per year from coffee and about 200,000/= per season from horticultural farming. In her pleadings she stated that they would get Shs.40,000/= from farming.

In cross exam she said she was not currently doing horticultural farming due to lack of finances. The deceased would have retired at aged 55 as he died before the raising of the retirement age to 60 years. Both counsels filed submissions. The Respondent submitted that the deceased would have continued farming for 11 years. This is the evidence that was adduced by the Respondent.

There is no dispute arising from the awards made under the Law Reform Act. And these are:-

(a) Pain and suffering – 10,000/=

(b) Loss of expectation of life – 100,000/=

The dispute is around the loss of dependency. The deceased died at the age of 54 years. This figure is captured from the payslip (PEXB.5) and the death certificate (PEXB4). He was a teacher by profession. He died on 8/7/2007. By that time civil servants were retiring at the age of 55 years.

So he was to retire in the year 2008 whatever the month of his 55th birthday. The enhancement of the years of retirement was effected in April 2009 and so the deceased was not covered. He could therefore have worked for only one (1) year then retirement. Its not explained how the learned trial Magistrate arrived at 1½ years. Ground 1 therefore succeeds. Coming to the multiplicand a payslip was produced as PEXB5. The gross pay was Shs.39,683/=. However, what the deceased took home was Shs.16,036/= as at April 2007. Since there were no other payslips produced then the position was assumed to have been the same when he died. What he took home at the end of the month would be the multiplicand.

Therefore Ground 2 & 3 is allowed. Ground 4 is about the issue of farming. The evidence shows that the deceased and plaintiff were coffee farmers and also did horticultural farming. The deceased was a

member of Kirinyaga District Farmers Sacco Society Ltd.

The coffee used to give them Shs.50,000/= but horticulture gave them good money. In 2002 they got Shs.200,000/=. She did not indicate what they got in 2005, 2006 & 2007. In cross exam she indicated that the 500 coffee bushes were still there and they yield coffee still.

But due to financial constraints she was not able to do the horticultural farming. At page 76 lines 17-19 of the record the learned trial Magistrate found that there was no evidence of the Shs.40,000/= made on farming by the deceased. She then made a finding that she found the economic value of the land to be Shs.200,000/=. This was a special damage and it was the duty of the Respondent to plead and prove her claim.

In paragraph 10 of the plaint she pleaded that the deceased earned Shs.40,000/= from the Teachers Service Commission and a net profit of Shs.40,000/= as a farmer. Therefore the issue of 200,000/= was never pleaded and is not supported by any evidence (like records). The learned trial Magistrate could not have relied on the plaintiff's word of mouth to make such a finding. There was no evidence adduced to show that the deceased used to make the Shs.40,000/= as net profit through farming.

It is not denied that the family has land it utilizes to do farming, but it was important that such evidence be availed to enable the court arrive at a proper finding. However, it is clear that the deceased was a farmer and a member of Kirinyaga Farmers Sacco Society Ltd. The shamba, coffee trees and cows are still there and the plaintiff has continued to utilize them. And it is also clear that the deceased was the one in formal employment.

The Respondent will not receive that financial support and as she has clearly indicated that since the deceased's death she has not done farming again. I find that a minimal support of 30,000/= in that area of farming would suffice for one year.

Ground 4 and 5 therefore succeed to that. In the famous case of **KEMFRO VS A.M. LUBIA & ANOTHER** it was held that the damages made under the Law Reform act must be taken into account when the award under the Fatal Accidents Act is made to void a party unfairly benefiting under both Acts. The learned trial Magistrate did not consider this.

After evaluating the evidence, I do find that the learned trial Magistrate did not consider the evidence in its totality. She failed to apply the known principles in a case of this nature.

I therefore allow the appeal and set aside the judgment delivered on 8/6/2010. I do assess the loss of expectation of life at a global figure of Shs.70,000/=. The loss of dependency will be calculated using a multiplier of 1 (one) year and a multiplicand of Shs.16,036/=

i.e. 16,036 x 12 x 2/3	= 128,288/=
Pain and suffering	- 10,000/=
Loss of life expectation	- 70,000/=
Loss of dependency	- 128,288/=
Farming	- 30,000/=
Total	238,288/=
Less	
Damages under Law Reform Act	- 80,000/=
Balance	- 158,288/=
Less	

30% contribution	- 47,486/=
Balance	- 100,802/=

There shall be judgment for the Respondent in the sum of **Shs.100,802/=** with costs.

Considering the loss that the Respondent has suffered, I will order that each party bears its/her costs for the appeal.

DELIVERED, SIGNED AND DATED AT EMBU THIS 20TH DAY OF FEBRUARY 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Ms. Ngari for appellant

Njue CC