



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 1 OF 2011

NEW KENYA CO-OPERATIVE CREAMERIES LTD

(FORMERLY KENYA CO-OPERATIVE CREAMERIES).....1ST APPELLANT

ISAAC CHELELGO KIMENGICH.....2ND APPELLANT

VERSUS

CHEBUSIT ARAP LANGAT.....RESPONDENT

(From The Judgment Of The Principal Magistrate, Hon. J.Kwena, Delivered On 17th December, 2010 In Pmccc No. 320b Of 2005 Between Chebusit Arap Langat Vs. New Kenya Co-operative Creameries Ltd And Isaac Chelelgo Kimengich)

JUDGMENT

This Judgment is the outcome of the appeal against the Judgment of **Hon. J. Kwena learned P.M. Vide Kericho P.M.C.C.C no. 320B of 2005 Chebusit Arap Langat =VS= New Kenya Co-operative Creameries Ltd and Isaac Chelelgo Kimengich delivered on 17th December, 2010.** The background of this appeal is short and straightforward. It is the evidence of **Chebusit Arap Langat** (the Respondent) that **Festo Kipyegon Langat** (deceased) was on 10th June 2005 lawfully walking along Kericho-Kisumu road near Nyaberi area when the 1st appellant's motor vehicle registration no. KXQ 623 while being driven by the 2nd appellant, hit the deceased, fatally injuring him. The Respondent wholly apportioned liability of the accident to the 2nd appellant. The appellants on the other hand, filed a defence to deny the Respondent's claim stating that it was due to the Respondent's negligence. When the suit came up for hearing, learned counsels from both sides recorded a consent order apportioning 30% liability to the Respondent and 70% to the Appellants. The case therefore proceeded for hearing on quantum of damages. On 17th December, 2010 the learned Principal Magistrate gave Judgment in favour of the Respondent in the following terms:

- | | |
|--|---------|
| 1. Damages for pain and suffering- | 10,000 |
| 2. Damages for loss of dependency- | 720,000 |
| 3. Damages for loss of expectation of life- | 80,000 |
| 4. Special damages including funeral expenses- | 31,180 |

Gross 841,180

5. Costs and interest at court rates

6. All 1-5 are subject to 30% reduction.

The appellants were aggrieved by the above award hence this appeal.

On appeal, the appellants put forward the following grounds in their memorandum of appeal:

1. That the learned trial Magistrate erred in law and in fact by adopting a dependency ratio of 2/3 without proof that this was the dependency that was lost.

2. That the learned trial Magistrate erred in law and in fact by adopting a multiplicand of Kshs.6,000 which was excessive and adopted without evidence to that effect.

When the appeal came up for hearing, this court directed the appeal to be determined by written submissions. I have considered the written submissions presented by both sides. The principles to consider in such an appeal are well settled. In Kemfro Africa Ltd t/a Meru Express Service, Gathogo Kanini =Vs= A.M.Lubia and Olive Lubia (1982-88) 1KAR 727, the court of appeal restated those principles when it held *inter alia*:

“The principles to be observed by any appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage;”

It is the appellants' submission that the trial Magistrate did not have evidence to support the award of Kshs. 6,000 as a multiplicand. It is also argued that the dependency ratio of 2/3 was not proved to have existed. It is the Respondent's submission that there were clear evidence which were presented to the trial Magistrate and which assisted her to make the award. It is argued that the deceased who was single used a large portion of his income to provide for his parents basic commodities. It is also argued that the deceased did farming to supplement his income. For this reason, it is argued that the trial court was right to award 2/3 as the correct dependency ratio. According to the Respondent, since the deceased had other sources of income, the multiplicand of Kshs.6,000 should be seen as on the lower scale.

It is not in dispute that the trial Magistrate used the multiplicand of Kshs.6,000 and 2/3 dependency ratio. The Respondent's case before the trial court was supported by the evidence of two witnesses. According to Chebusit Arap Langat (PW1), the deceased's father, the deceased was aged 23 years at the time of his death. PW1 further stated that the deceased earned Kshs.10,000 a month. He also stated that the deceased provided for him and his mother food and clothing. PW1 was emphatic that the deceased made Kshs.10,000 per month. He said he used to sell sugar cane to Muhoroni Sugar Factory and that he also traded in livestock. PW1, however did not have records of the deceased's incomes.

On ground 1, it is argued that, the trial Magistrate adopted a dependency ratio of 2/3 without proof that this ratio was the dependency that was lost. The trial Magistrate stated that since the deceased was not married his parents were his dependants hence the 2/3 dependency ratio as suggested by the advocates was reasonable. The appellants have faulted this finding on the ground that the deceased was not the only one assisting his parents since he had an older brother.

It is clear from the record that the learned trial Magistrate fixed the award as proposed by the Respondent's advocate. I think the dependency ratio of 2/3 is abit exhorbitant in the circumstances of this case. I say so because: **first**, there was no evidence to support it and **secondly**, there was evidence that the deceased had a brother who also supported their parents. I am convinced the trial Magistrate fell into error on this score. I am satisfied that the most reasonable dependency ratio is 1/3. Consequently, I will set aside trial Magistrate's dependency ratio of 2/3 and substitute it with that of 1/3.

The second ground is to the effect that the trial Magistrate adopted a multiplicand of Kshs.6,000 which was excessive and without supporting evidence. There is no dispute that the deceased was a farmer cum businessman. There is no dispute also that there were no records showing he actually earned Kshs.10,000

per month. It is a matter of common notoriety in this county that unless one is in formal employment it is difficult to ascertain his income. The figure of Kshs.10,000 per month could as well be on the lower scale or exaggerated. In her judgment at page 2, the trial magistrate states as follows:

“The father claims he earned from his son some money subtracted from his monthly income of Kshs.10,000. That the deceased made Kshs.10,000 in a month is an allegation not supported by any material evidence.....The court will accept a monthly income of Kshs.6,000 as opposed to the suggested Kshs.10,000.”

It is the submission of the appellant that the figure of Kshs.6,000 given by the trial Magistrate was not supported by any evidence. I have already stated that in rural Kenya, records of a farmer's income are rarely kept as opposed to being in formal employment. I am convinced the trial magistrate was right to make such an assumption. Therefore, the figure given by the trial court was neither excessive nor unreasonable .

In the end, the appeal partially succeeds. For the avoidance of doubt the trial court's judgment is adjusted as follows:

1.Damages for pain and suffering	Kshs.10,000
2.Damages for loss of life expectancy	Kshs.80,000
3.Damages for loss of dependency	6000 x 1/3 x 15x12
	Kshs.360,000
4.Special damages	Kshs. 31,180
Gross	Kshs.481,000
Less contribution 30%	Kshs.144,300
Net	Kshs.336,700
	1,180
5.Costs of the suit plus interest at court rate	
	Kshs.337,880

Dated, Signed and delivered this 3rd day of December,2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Ochieng for the Respondent

N/A for Mr. Onyinkwa for the Appellants

Mr. Korir- court clerk