



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Civil Appeal 18 of 2009

MESHACK NJEMA ODONGO APPELLANT

V E R S U S

WEST KENYA SUGAR CO. LTD. RESPONDENT

J U D G E M E N T

The plaintiff is the personal representative of the late **Joshua Odongo Nyongesa** who died in an accident on 16th April, 2006. The deceased used to work for the Respondent and on the material day was on board the Respondent's tractor registration No. KAL 276 V ZL 3204.

Parties agree on liability at 80%. 20% in favour of the Appellant. the trial court assessed damages but the Appellant was not satisfied with that assessment and preferred this appeal. The main grounds of Appeal are that:-

- 1) The learned magistrate failed to make any award under the Fatal Accidents Act.
- 2) Appellant had proved his dependency on the deceased
- 3) Trial court did not calculate loss of expectation of life based on the deceased's age.
- 4) No award for lost years and funeral expenses was made
- 5) The award is manifestly in-adequate.

Mr. Kiveu appeared for the Appellant while Mr. Nyikuli

appeared for the Respondent. Both counsels consented that submissions in this Appeal shall be adopted in Appeal No.18 of 2009.

Mr. Kiveu submitted that the plaint in paragraph five stated for whose benefit the suit was being brought. The names of the dependants was listed yet the trial court failed to make an award under the Fatal Accident Act. Baptismal cards were produced for the dependants.

Counsel further submitted that the trial court erred in law in failing to make an award under lost years

and funeral expenses under the Fatal Accident Act. Courts can make awards under both Act and if the damages under both Acts devolve on the same dependants then damages under the Law Reform Act are reduced to some extent.

Counsel contended that the award made is so low and it can be deemed to have been erroneous. KShs.60,000/= was awarded for loss of expectation of life and KShs.5,000/= for pain and suffering. The trial court dismissed the claim for loss of dependency and lost years. The amount both for each plaintiff was KShs.52,000/= and this is not only inadequate but erroneous too. Counsel relied on the case of **GEOFREY CHEGE MITHU –VS- M/S ANVERALI & BROTHERS – NAKURU CIVIL APPEAL NO.68 OF 1997** and that of **WILLIAM JUMA –VS- KENYA BREWERIES LTD. – NAIROBI HCCC NO.3514 OF 1985**.

Mr. Nyikuli for the Respondent opposed the appeal and urged the court not to disturb the awards. The claim for dependency was not proved. The baptismal cards produced had different names from those indicated in the plaint. Counsel further submitted that the deceased's income was not proved. The issue was not the level of dependency but the dependency itself. Further, it was not possible to make assessment for lost years given the evidence. The appellants were aware that if damages were awarded under the Fatal Accident Act then damages under the Law Reform Act are forgone. The appellants in their written submissions did not submit on lost years. The appellants simply gave figures for the claim under lost years and did not give any proposed multiplier.

Mr. Nyikuli further submitted that the claim for expenses was not pleaded in the plaint. What was spent during the funeral was not explained. The award is reasonable and should be left undisturbed.

The only issue for determination is on quantum, whether the amount awarded is reasonable or adequate and whether the trial court applied the correct legal principles in making the award.

In this Appeal the deceased was 31 years. According to paragraph five of the plaint, the deceased used to work as a cane loader and his earnings are stated at paragraph 6 as KShs.9,000/= per month. The plaint in its prayer for special damages has a claim for Funeral expenses, post mortem Report and Police Abstract. The plaintiff's wife and children are listed as some of the dependants. The brother obtained Grant of Letters of Administration Intestate for the deceased's estate in Kakamega Succession Cause No.794 of 2007.

From the proceedings, PW1 who is the appellant testified that the deceased used to earn KShs.100 per trip as cane loader with West Kenya Sugar Co. Ltd., the respondent. He would at least make 3 trips a day. The deceased had a wife and six children. PW1 testified that he spent KShs.60,000/= during the funeral. He bought two heads of cattle, maize, beans and other food stuff.

It is well established in law that a plaintiff in fatal accident claims can claim damages both under the Fatal Accident Act and also under the Law Reform Act. All the court has to do where it is in making an award under the Law Reform Act, regard has to be made in the damages made under the Fatal Accident Act.

The trial court dismissed the claim under the Fatal Accidents Act on the basis that dependency was not proved and that the deceased's earnings were also not proved. **Section 4 (1)** of the Fatal Accidents Act provides as follows:-

“Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and children of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought and the amount so recovered, after deducting the costs not recovered from defendant, shall be divided amongst these persons in such shares as the court, by its judgement, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject-matter or complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

The Appellant testified that the deceased was married and had six children. I am satisfied that the deceased’s wife and children used to depend on the deceased. The trial court erroneously dismissed that claim.

The deceased was 31 years. He had a family that depended on him. I will adopt a multiplier of 15 years. I will assess his monthly salary at KShs.4,000/=.

In the end, I will set aside the award made by the trial court and replace it with the following:-

(1) Law Reform Act

(a) Pain and suffering KShs. 5,000/=

(b) Loss of expectancy of life KShs.100,000/=

(2) Fatal Accident Act

(a) Loss of dependency

4000x15x12x2/3..... KShs.480,000/=

(b) Funeral expenses KShs. 15,000/=

(c) Police Abstract KShs. 100/=

TOTAL..... KShs.600,100/=

Less 20% Liability KShs.120,020/=

TOTAL AWARD KShs.480,080/=

I have enhanced the award under loss of expectation of life as the current trend is to award KShs.100,000/=. In making this award I do take into account the award made under the Fatal Accident Act.

The plaintiff shall have the costs for the lower court case but each party shall meet its own costs of the Appeal.

Delivered, Dated and Signed at Kakamega this 12th day of November, 2009

SAID J. CHITEMBWE

J U D G E