



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 14 of 2004

ELDORET PACKERS LIMITED APPELLANT

=VERSUS=

IGNATIUS ROTICH RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Chief Magistrate Solomon

Wamwayi in Eldoret CMCC No.82 of 2003 dated and delivered on 22nd December 2003)

JUDGMENT

This is an appeal against the decision of the Chief Magistrate at Eldoret in CMCC No. 82 of 2003 delivered on 23rd December 2003.

By Consent of parties, judgment on liability was entered for the Plaintiff against the third party in the ratio of 20% to 80% respectively. The Honourable trial Magistrate proceeded to assess general damages under the Fatal Accidents Act and the Law Reform Act. He made the following award:-

- Special Damages shs 150/=
- General Damages shs 1,467,040/=
- Loss of Expectations of Life shs 100,00/=

Sub – Total shs 1,567,190/=

Less 20% Contribution on Liability shs 313,438/=

TOTAL shs 1,253,752/=

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The Third Party being aggrieved with the said assessment and award filed this appeal. At the hearing, the Appellant took up two main grounds, namely:-

1. That the award of damages under the Fatal Accidents Act should have taken into account the amount awarded under the Law Reform Act in the sum of Kshs 100,000/=.
2. That the trial Court misdirected itself when it applied a multiplicand of shs 9,169/= per month as the deceased’s monthly earnings

instead of shs 4,965/= (as shown in the evidence i.e. pay slip for June 1997).

I have considered the judgment, proceedings, memorandum of appeal and submissions by Counsel. In Civil Appeal **No. 14 of 1989** –

MAINA KANIARU & JANE WAHITO -V- JOSEPHAT MURIUKI WANGONDU, the Court of Appeal held and observed:-

“ The rights conferred by section 2 (5) of the Law Reform Act (Cap 26 Laws of Kenya) for the benefit of the Estate of deceased person are stated to be in addition to and not in derogation of any rights conferred on the dependants of the deceased by the Fatal Accidents Act. This does not mean that damages can be recovered twice over but that if damages recovered under Law Reform Act devolve on the dependents the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act.”

This Court is bound by the aforesaid decision and I must apply the said principle. The trial Court ought to have done that in the first place. I therefore find that the learned trial Magistrate erred in law and misdirected himself. The trial Court made an award under the Fatal Accidents Act and also under the Law Reform Act. The latter was in the sum of Kshs 100,000/=. The amount under the Fatal Accidents Act shall now be reduced to that extent.

With regard to the multiplicand, I have carefully studied Exhibit 3 of the evidence which contained copies of the deceased’s salary slip for May 1997 and that of June 1997. The sum of Kshs 9,169 in the pay slip for May 1997 and shs 4,965/= for June, 1997 are the **Net Pay** respectively and not the true earnings of the deceased. The net pay is after deductions of Social Security (PAYE), health cover, Co-operative loans etc. The deceased’s basic salary in both the pay slips was shs 7,045/=. He also was entitled to house allowance of 2,058/= per month and medical allowances of shs 990/= making his total earnings to be shs 10,098/= per month.

In determining the multiplicand, I think the medical allowance ought not be taken into account since it is deemed this was for her personal health cover. There is no evidence tendered to show that this allowance was for her spouse or children. However, with regard to the house allowance, I think that this is a loss to the dependents of the deceased. As a civil servant who was expected to be in employment until 55 years, I think that it is reasonable to allow this benefit (house allowance) to flow to the dependents.

It is my view therefore that the correct multiplicand should have been as follows:-

Basic income Kshs 7,045/=

House Allowance Kshs 2,058/=

Total Kshs 9,103/=

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The trial Court used a multiplicand of shs 9,169/= but on incorrect basis. There was no dispute or challenge of the multiplier of 20 years. I do therefore work out the loss of dependency as follows:-

- shs 9,103 x 12 x 2/3 x 20 which comes to shs 1,455,480/=.

The result of the foregoing is that I do hereby quash and set aside the judgment in the trial Court and enter judgment as follows:-

Loss of dependency shs 1,455,480/=

(under Fatal Accident Act)

Loss of Expectation of life shs 100,000/=

(under Law Reform Act)

Special damages shs 150/=

shs 1,555,630/=

Less damages under

Law Reform Act shs 100,000/=

shs 1,455,630/=

Less 20% Contribution shs 291,126/=

Grand Total shs 1,164,504/=

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Judgment is entered for the Plaintiff against the third party / Appellant in the sum of **Kshs 1,164,504/=**. The Defendant (Appellant herein) shall pay the costs of the Suit in the Chief Magistrate's Court. The Appellant shall be paid 20% of the Costs of the Appeal being successful to a limited extent. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF FEBRUARY, 2008.

M.K. IBRAHIM,

JUDGE. 19/02/08.
