



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 43 of 2004

[Being an appeal from the Judgment and decree of the Hon. Hellen Wasilwa – SRM in Nakuru Chief Magistrate’s Court CMCC No. 1554 of 2003 delivered on the 2nd day of March 2004]

**AFRICAN DIATOMITE INDUSTRIES LIMITED
APPELLANT**

VERSUS

CHRISTOPHER OSINAMONGO OTWANE (*Suing as the legal representative of*

***the Estate Of HILLARY OMELLA OTWANE*)
RESPONDENT**

JUDGMENT

The appellant, *African Diatomite Industries Limited* in this appeal was the defendant in **Nakuru CMCC 1554 of 2003**. *Christopher Osinamongo Otwane* suing as the legal representative of the estate of *Hillary Omella Otwane* sought for general and special damages in respect of an industrial accident which occurred on 20th January 2001.

The deceased *Hillary Omella Otwane* was employed by the appellant as a casual worker at the appellant’s premises and on the material day the deceased was engaged in the course of his work with the appellant at **SoySambu** estate where they were digging quarry and there was a collapse of the quarry on the deceased wherein he sustained fatal injuries.

The respondent attributed the negligence on the part of the appellant according to the particulars stated in the plaint. As a result of the said accident, the estate of the deceased also lost the support and according to the particulars in the plaint, the deceased was survived by a child and a wife, the respondent had also another brother. The respondent who had obtained the letters of administration in respect of the deceased estate gave evidence in support of his claim.

He was not at the scene of accident when the deceased sustained the fatal injuries but he was called and arrived at the scene of the accident immediately after the accident. He visited the scene after the accident and in his opinion the place where the deceased died provided an unsafe system of work as he found other people working underground using spades and metals. The respondent said that he was able to see how the deceased was buried in the sand in the course of his duty.

He testified that the deceased was earning **Kshs.3,101.80** per month. He was aged 35 years as at the time of his death, he was married and had one child whom he was providing for. The respondent also produced a receipt of 1,200/- being the sum that he paid as mortuary fees.

On the part of the appellant, evidence was given by two employees; **Paul Maina, DW 1** who was at the time working with the deceased in the same quarry. He detailed how they were digging for diatomite at a quarry in **Soi Sambu** estate and the deceased was digging at the side of the wall which lacked balance. This witness told the court that before the accident occurred, their supervisor, **Ibrahim Mwashu Muuyanza, DW 2** had warned the deceased and asked him to move to another place but when the supervisor went to the office, the deceased moved to where he had been told not to dig, that is when the wall collapsed.

The supervisor also told the court how he had warned the deceased not to dig at the particular site but when he returned to the factory, he was later called and found the deceased had gone to the forbidden site and the wall had collapsed. He said that for this particular work, one did not require training to dig a quarry. They also used to provide the workers with gloves but not the helmet. He denied that the appellant exposed the deceased to any danger. He also denied that the deceased had a wife or child.

The learned trial magistrate after considering the evidence found the appellant was liable for the accident and awarded Kshs.730,360/- which was made up as follows;

Loss of dependency Kshs.3, 101.80 x12x25x2/3

Kshs.620, 360/-

Loss of expectations of life **Kshs.100, 000/-**

Pain and suffering **Kshs. 10,000/-**

The respondents were also awarded cost of the suit.

Being dissatisfied with the entire judgment the appellant appeal and raised the following grounds of appeal;

- (a) The learned trial magistrate erred in law and in fact in coming to the conclusion she did on liability without any or any credible evidence.**
- (b) The learned trial magistrate erred in law and in fact in awarding general damages far in excess in the circumstances.**
- (c) The learned trial magistrate erred in law and in fact in awarding general damages for loss of dependency on the basis of unproven evidence.**
- (d) The learned trial magistrate erred in law and in fact in coming to the conclusion she did on quantum of damages without any or any credible evidence.**

In further arguments in support of the above grounds, learned Counsel for the appellant **Mr. Mbugua** submitted that the trial court did not address the issue of liability while taking into account the evidence by the defence witnesses. Counsel invited the court to consider that there was no evidence whatsoever to support the particulars of negligence as the respondent who gave evidence was not present when the accident occurred.

Secondly, the defence evidence by the two witnesses clearly established that the deceased was operating on his own having disobeyed the instructions of the supervisor who warned him to stop digging at the place.

Thirdly, the decision by the trial court on how it arrived at the assessment of loss of dependency and the use of the multiplier of 25 years was not clearly explained nor was it reasoned out. The deceased was working as a casual worker. He was 35 years old and there were no special circumstances reasoned to apply the multiplier of 25 years.

Lastly, Counsel for the appellant submitted that there was no evidence to prove that the deceased had a son and a wife. The alleged wife did not give evidence and no documents were produced to prove that he had a son and thus the dependency ratio of 2/3 was erroneous as that is based on the assumption that a married person uses 2/3 of his salary towards his family and 1/3 for himself.

Learned Counsel for the respondent **Mr. Juma** was of the view that the decision of the trial court should be upheld. There was no doubt that the wall collapsed on the deceased while he was working for the appellant. The appellant completed the workman's compensation form which clearly shows that the deceased was working for the appellant when the quarry collapsed thereby inflicting fatal injuries on the deceased. The deceased was also not provided for with the protective garments such as a helmet. The respondent who obtained the letters of administration and filed this case on behalf of the dependants of the deceased said that the deceased was married and had a child. And therefore the evidence of the defence witnesses regarding the marital status of the deceased was without basis.

As regards the multiplier of 25 years Counsel for the respondent submitted that the deceased was a casual worker and there is a probability he could have worked up to the age of 60 years and 25 years is a reasonable multiplier.

This being a first appeal this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation of the findings of the trial court by an appeal court have been established in several decisions in the case of **Butt Vs Khan [1982 – 1988] IKARI: -**

“An appellate court will not disturb an award of damages unless it is so 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 is inordinately high or low.”

What is available from the records of the trial court especially the judgment, the learned trial magistrate held that the deceased was on duty at the material time and she narrated the evidence of the defence witness who said that the deceased was not following the instructions of the supervisor. And in the trial magistrate's view, the deceased needed supervision. The trial court also considered the information contained in the workman's compensation form which clearly showed that the deceased was employed by the appellant and was working inside a quarry which collapsed on him. The trial court considered that the place where the deceased was working was not safe and the appellant had a duty of providing a safe working place for his workers.

In the case of **Kiruga Vs Kiruga & Another [1988] KLR page 348** where the Court of Appeal held

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

Taking into consideration the assessment and the evaluation of the evidence by the trial court regarding liability, am satisfied that the trial court properly followed the laid down principles and I find no justification in interfering with the assessment of liability by the lower court. Moreover, as it was held in the case of **Elijah Mwangi Kanoga Vs Socfinaf Company Limited Civil Appeal No. 307 of 2001 – Nairobi**

“At common law an employer is under a duty to take reasonable care for the safety of his employees in all circumstances ... so as not to expose them to unnecessary risk (See Halsbury's Laws of England, 4th Edition, Volume 16, Paragraph 560).

In **Makala Mailu Mumende Vs Nyali Gold & Country Club C.A. No.16 of 1998**, J Nyarangi J A stated *inter alia* that:

“Just because an employee accepts to do a job which happens to be inherently dangerous is in my judgment no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection ...”

As regards the loss of dependency it is clear from the evidence that the deceased was earning **Kshs.3,101.80** and he was aged 35 years at the time of the accident. Several authorities were submitted both by the respondent and the appellant which, should have guided the court on the multiplier. From those decided cases to wit: -

Nairobi Hccc No.2774 of 1992 – Pauline Kuloba Mwadimu Vs Duncan Mwandago Mwikamba and Nairobi Hccc No. 4742 of 1987 – Benjamin Mbuthi Nzomo Vs Benjamin Mutunga Mue & Another.

The age limit for the loss of expectation of life is 55 years. That is also a conventional number of years that a deceased is assumed to be actively engaged and also to provide for the family. It is generally assumed that one retires at the age of 55 years which is the mandatory age of retirement for public servants. This coupled with other uncertainties in life, the age of 55 is reasonable. The trial court did not give reasons why it deemed it to adopt the multiplier of 55 years which means the deceased would have worked up to the age of 60 years.

On the amount spent on the deceased dependants, similarly the trial court did not give reasons why the percentage of 2/3 was awarded to the dependants. There is evidence on record especially a letter dated 24th August 2001 written by the District Officer Chelangani Division indicating the survivors of the deceased. The list consists of deceased parents, brothers and a sister. There is no wife or child who is named as a survivor of the deceased. This evidence coupled with the fact that no evidence was adduced by the respondent to prove that the deceased had a wife and child, the dependency of 2/3 was clearly an error.

On the issue of the loss of expectation of life, a conventional of a sum of Kshs.70, 000/- has been adopted by this court in several decisions. I have gone through the submissions by Counsel for the respondent and I have seen that authorities were put forward in which a deceased claimant was awarded Kshs.100,000/- for loss of the expectation of life. In that regard I will not interfere with that award by the trial court. On the issue of pain and suffering, the deceased must have died as a result of suffocation and I find an award of Kshs.10, 000/- reasonable.

The upshot of the above analysis and the re-evaluation of the evidence and judgment of the trial court, this appeal succeeds partly on the issue of the assessment of loss of dependency which is set aside and substituted with a sum of Kshs. 482,216/ which is made up as follows: -

$3,101.80 \times 12 \times 20 \times \frac{1}{2} =$ **Kshs.372, 216/-**

As the sum awarded to the respondent

For the loss of dependency.

Loss of the expectation of life **Kshs.100, 000/-**

Pain and suffering **Kshs. 10,000/-**

TOTAL **Kshs.482, 216/-**

The judgment of the lower court is hereby substituted with the award of **Kshs.482, 216/-** with costs. Each party should bear the cost of this appeal.

It is so ordered.

Judgment read and delivered on 16th day of March 2007.

MARTHA KOOME

JUDGE