



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 114 'B' OF 2019

MARS LOGISTICS LIMITED.....APPELLANT

VERSUS

SUSAN KAVOGOI (Suing as the administrator, a dependant and

on behalf of the dependants of EVANS IMBALIA ANDIVA).....RESPONDENT

JUDGMENT

1. The respondent, **SUSAN KAVOGOI** (suing as the administrator, a dependant and on behalf of the dependants of **EVANS IMBALIA ANDIVA**) instituted a suit against **MARS LOGISTICS LIMITED** (the appellant) in which she sought orders against the appellant for negligence as a result of an accident which occurred on 5th November 2013 along the Eldoret Kitale road at Baharini where **Evans Imbalia Andiva** succumbed as a result of the injuries within. The respondent attributed the accident to negligence by the appellant and/or its servant/agent. The suit was heard and judgment was entered against the appellant as follows;

a) Liability 80:20 in favour of the plaintiff as against the defendant.

b) Loss of Dependency – kshs. 1,768,000/-

c) Special damages – kshs. 12,050/-

d) Subtotal – kshs. 1,780,050/-

e) Less 20% contribution – kshs. 356,010/-

f) Total – kshs 1,424,040/-

The appellant being dissatisfied with the orders of the court filed the present appeal.

2. The appellant is seeking to have the damages awarded under the fatal Accident Act in particular the multiplicand and multiplier set aside. The only issue for determination in this appeal is whether the amount awarded on quantum was reasonable. The appellant avers that the trial magistrate applied the wrong principles in the assessment of damages by failing to take into account relevant factors and the evidence on record in the assessment of damages under the fatal accidents act.

3. The deceased was aged 43 years at the time of his death and was said to be a boda-boda rider. The court adopted a multiplier of 17 years. The court adopted the maximum multiplier and the same was not discounted. It is on this basis that the appellant submits that the multiplier adopted was high which led to the court awarding excessive damages. A multiplier is the estimated number of lost working years accepted as reasonable in the circumstances. The appellant's lament is that the trial magistrate never took into account life's vicissitudes or vagaries and thereby failed to discount the multiplier. He cites the case of **Ghunibai J Patel & Another v PF Hayes and another (1957) EA 748,749** where the court held that:

“In choosing the said figure, usually called the multiplier, the court must bear in mind, the expectation of earning of the life of the deceased, the expectation of life and dependency of the dependants, and the chances of life of the deceased and the dependants. The sum thus arrived must then be discounted to allow the legitimate considerations”

4. The trial court adopted a multiplicand of kshs. 13,000/- and the appellant argues that the multiplier adopted was on the higher side. It is contended that the trial court should have taken into account that the deceased was alleged to be a boda-boda rider, power saw operator and a pastor yet no evidence of the same was presented. Further, that given the risky nature of the being a boda boda riders occupation, the

deceased was prone to a lot of accidents and it was very unlikely that the deceased could have worked up to the age of 60 years, so a multiplier of 10-12 years should have been used.

5. It is thus argued that in such a scenario, the trial court should have adopted a minimum wage for a general worker (Kshs. 5,218/-), and there was no basis upon which the magistrate adopted Kshs. 13,000/-. The appellant submits that the trial court adopted the wrong principles in assessment of damages, and a multiplicand of Kshs. 5,218 using the regulation of wages (General)(Amendment) Order, 2013 should have been used.

The appellant prays the appeal be allowed with costs.

6. The respondent contends that it is a settled principle of law that a superior court should not interfere with the award of damages by the awarding court unless it is shown that the latter court awarded damages that are inordinately high or low or too low as to amount to an erroneous estimate, or that the court taking into account irrelevant issues in assessing damages.

7. The respondent points out that the deceased was 43 years of age as at the time of his death. He had 6 children who were dependent on him for daily sustenance. The death certificate and a copy of the deceased's IDs were produced as proof of his age.

8. Further, that she had testified that the deceased was a pastor and also operated a boda boda and power saw businesses, and that his income was approximately Kshs. 20,000/-. Drawing from the case of **David Mwenda & Another vs Alice Kawira (suing as the administrator of the estate of John Munyoki Malyunga (Deceased) Civil Appeal No. 109 of 2017(2018) eKLR** where the court of appeal held that a sum of Kshs 10,000/- to be reasonable for a boda-boda operator, she argues that the trial court did not err in any way in using a multiplicand of Kshs. 13,000/-.

9. That in any event it is not in dispute that the deceased was 43 years old at the time of his death. She maintains that the deceased was active and juggled more than one job to support his family, so he would probably have lived up to the retirement age of 65 years, and the trial court was correct in arriving at a multiplier of 17 years.

10. As to the dependency ratio both the appellant and the respondent were in agreement that the dependency ratio should be 2/3. The same should not be disturbed. The respondent prays the appeal be dismissed with costs to the respondent.

ISSUES FOR DETERMINATION

Whether the court applied the wrong principles in assessment of damages

WHETHER THE COURT APPLIED THE WRONG PRINCIPLES IN ASSESSMENT OF DAMAGES

11. In **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** the court of appeal held;

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa 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. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

12. On the multiplicand it is important to point out that the deceased was not just a general worker- he was a boda-boda rider (even the circumstances under which he met his death confirm this as did the evidence of the police officer (PW1) who testified. I however concur with the appellant's counsel that claims of being a pastor and operating a power saw business were unsupported by any tangible evidence. The trial court indeed took cognisance of the fact that claims of the deceased's income were not proved and used a multiplicand of 13,000 without giving any reason for the same. I think that is why the appellant feels that the trial court just plucked a figure from the abacus and applied it without reason or rhyme-although I must acknowledge that that the general principle is that assessment of damages is at the discretion of the court.

13. I take note that the court in **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR**, Ngaah J while quoting with approval the case of **Gammel versus Wilson (1981) 1 ALL ER 578** stated as follows:

"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

14. Drawing from these past decisions, and given that the figure suggested by the appellant is the statutory minimum wage for persons whose occupations/earnings are indeterminate. It is unfortunate that the evidence presented at the trial did not even suggest how much the deceased was earning per day, the respondent opting to waft in global figures. I hold the view that the court did not apply the correct principles in reaching its assessment, and it would be rational and fair to apply just slightly above the statutory minimum which is **KShs 8000/- as a global figure just slightly above the minimum, taking into consideration that the statutory minimum wage is for 8 hours of work. I**

also take judicial notice that boda boda riders often do about 15 hours of operations per day- starting at the crack of dawn, and clocking out long after most people have gone home to roost. I therefore set aside the multiplicand of Kshs 13,000 and substitute it with a sum of **Kshs 8000/-**

15. On the **multiplier**, again there was no explanation given by the trial court as to why it picked on the 17 years although there is nothing to suggest that the deceased was of frail health. However, certainly given the nature of work he was performing on a daily basis, prone to accidents and brushing shoulders with death on the road was always a close call. Apart from that there is the level of life expectancy in the country which currently stands at, and coupled with the other vagaries of life, then I think to conclude that the deceased would have worked up to age 60 (being the statutory retirement age, was rather ambitious!! I think a multiplier of **12 years** is more reasonable. I therefore set aside the figure of 17 years and substitute it with 12 years.

16. The upshot is that the finding has a ripple effect on the sum awarded for loss of dependency which is now worked out as follows:

$$8000 \times 12 \times 12 \times 2/3 = 768,000 \text{ (Seven Hundred and Sixty-Eight thousands only)}$$

In the premises the appeal succeeds and costs of the appeal are awarded to the appellant.

E-DELIVERED AND DATED THIS 8TH DAY OF MARCH 2021

H. A. OMONDI

JUDGE