



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.3 OF 2018

GULSAN INSAAT STNVTAS.....APPELLANT

VERSUS

NASIBO DOYO DUBA.....1ST RESPONDENT

ROBA JILLO FALANA.....2ND RESPONDENT

(Being an Appeal from the original Civil Suit No.20 of 2016 of Hon. B.M. OMBEWA Principal Magistrate Marsabit)

JUDGMENT

The late Abdi Roba Jillo died on the 17th May, 2015 . His mother and wife (respondents) filed Civil Suit No.20 of 2016 before the Marsabit Principal Magistrate's Court seeking damages against the appellant. The trial court found the appellant 100% liable and awarded the respondents Ksh.20,000/- for pain and suffering, Ksh.100,000/- for loss of expectation of life, Ksh.20,000 special damages and Ksh.6,323,000 for loss of dependency.

The appellants preferred this appeal which is brought on the following grounds:-

- 1. The Hon. Learned Magistrate erred in law and fact by pronouncing 100% liability in his judgment in favour of the Respondent when the case was not proved on balance of probabilities.***
- 2. The Hon. Learned Magistrate erred in law and fact in failing to appreciate that the appellant had given strict guide lines to the employees regarding their safety and proceeded to condemn the Appellant to bear full burden.***
- 3. The Hon. Learned Magistrate erred in law and fact by finding that the respondent was entitled to full damages and disregarded the fact that the appellant had actually installed pipes outside the dam that ought to have been used by the respondent to clean the vehicle.***
- 4. The Hon. Learned Magistrate erred in law and fact by ignoring the fact that drivers had been warned not to leave their vehicles while at the dam.***
- 5. The Hon. Learned magistrate erred in law and fact by not finding that the respondent had willfully and greatly contributed to his accident.***
- 6. The learned Magistrate erred in law and fact by not appreciating that the respondent's accomplice had taken great care in the circumstances and testified during the proceedings that he could not risk rescuing the respondent when he drowned.***
- 7. The respondent on balance of probability did not prove his case.***

Mr. Kiogora appeared for the appellant. Counsel submit that from the evidence of DW1 it is clear that the deceased could not have died while fetching water to wash the appellant's lorry as alleged by the claimant. DW2 found the deceased's body naked and only had an underwear. Photos were produced showing the body. The deceased clothes were found in the motor vehicle. It is possible that the deceased intended to swim in the pool but drowned. The photos produced shows that there was a pool within the working area. According to DW1, a Police inquest was conducted at Laisamis and found that the deceased could have either committed suicide or drowned since he had never swam in his life. The deceased was on a frolic of his own and was not taking any assignment by the appellant. The pool area had clear signs indicating that it was not to be used for swimming and no authorized persons were allowed access to the area. Counsel relies on the case of **Statpack**

Industries V James Mbithi Munyao (2005)eKLR where Visram J (as he then was) stated as follows:-

Coming now to the important issue of “causation”, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a casual link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable.

Mr. Kiogora maintain that the trial court ignored to take into consideration photographic evidence produced before the court. there was no negligence on the part of the appellant. The drivers were not allowed to park their vehicles near the pool. The respondents did not prove that the appellant failed in his duty of protecting the deceased from falling and drowning in the pool. The deceased was entirely to blame. Should the court apportion liability then the deceased should be held 90% liable.

On the issue of quantum, Counsel submit that an award of Kshs.80,000 is sufficient for loss of expectation of life. Counsel relies on the case of **JAMES GAKINYA and ANOTHER (suing as legal representatives of the estate of DAVID KELVIN GAKINYA (Deceased) V PERMINUS KARIUKI GITHINJI (2015)eKLR** where the court awarded Ksh.80,000 for loss of expectation of life. With regard to loss of dependency, it is submitted that the deceased was 25 years old when he met his death. No payslips were produced to prove that he was earning Kshs.35,000 per month. The dependants are the wife, son and father. It is submitted that the court should be guided by the Regulation Of Wages (General Amendment) Order, 2017 which sets the minimum wages for heavy commercial drivers for those working outside cities and municipalities at Ksh.25,737.20. That amount should be subjected to taxation leaving a balance of Ksh.15,000/-. Mr. Kiogora proposes a multiplier of 20 years and dependency ratio of ?. This leads to an award of Ksh.2.4Million for loss of dependency.

With regard to funeral expenses it is submitted that the respondents’ contention that they spent Ksh.30,000 was not proved. The appellant gave the family Ksh.50,000 and a receipt to that effect was produced. The expenses were fully catered for by the appellant. The respondents pleaded for Ksh.20,000 as special damages but no receipts were produced. Counsel contend that the award for loss of expectation of life ought to be deducted from the award for loss of dependency. Counsel relies on the case of **MWITA NYAMOHANGA & ANOTHER V MARY ROBI MOHERAI**(suing on behalf of the estate of **JOSEPH TAGARE MWITA (DECEASED) & ANOTHER (2015)eKLR**. It is submitted that in that case the court cited the court of Appeal decision of **KEMFRO V A.M. LUBIA & AND ANOTHER (1982 -1988) KAR727** where the court stated as follows:-

“The net benefit will be inherited by the same dependents under the Law Reform Act and that must be taken into account in the damages awarded under Fatal Accident Act because the loss suffered under the latter Act must be offset by the gain from the estate under a former Act.

The duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependents under the Fatal Accident Act are the same hence the claim for the lost years and dependency will go to the same persons. The principals does not mean that a claimant under the Fatal Accident Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act hence the issue of duplication does not arise.”

Mr. Orayo appeared for the respondent. It is submitted that the appellant failed to provide and maintain a safe working system for its workers and in particular the deceased. The appellant left unfenced a large and dangerous pool/dam which exposed the deceased to risk of injury or damage which they knew or reasonably ought to know. The evidence on record shows that the appellant’s drivers used to wash their trucks at the pool/dam. There is evidence that the dam was fenced after the fateful death of the deceased to alleviate future incidents. Counsel relies on the case of **Mumende V Nyali Golf and County Club (1991)eKLR** where the Court of Appeal sitting in Mombasa held as follows:

“1. That it is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger to avoid any negligence”

2. Just because an employee accepts to do a job which happens to be inherently dangerous is 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”.

On the issue of quantum it is submitted that the award by the trial court is reasonable and not inordinately high or excessive to warrant interference by this court.

This is a first appeal and the court is supposed to evaluate the evidence afresh and make its own conclusion. Three witnesses testified for the respondents while one witness testified for the appellant.

PW1 Roba Jillo Fallana is the deceased’s father. On 17th May 2015 he got information that the deceased had drowned. It was about 6.00pm. He went to the Police station and found the body. The deceased was buried the following day. They incurred expenses in the burial. The deceased was working as a driver with the appellant. The employer paid Ksh.50,000 on the burial date. The deceased’s co-workers also made contributions but the appellant deducted the ksh.50,000 which it had earlier paid to the family. He obtained letters of administration at a cost of Ksh.20,000. The deceased was earning Ksh.38,000/-. He produced the deceased’s payslip for May, 2015. He visited the scene and saw the dam where the deceased drowned. The body had no injuries. The deceased used to assist him with money.

PW2 Nasibo Doyo Duba is the deceased’s wife. It is her evidence that the deceased died on 17.5.2015 at his place of work. The deceased was a driver with appellant company. They had one child namely Hussein Abdi Roba and they all who depended on the deceased. The

deceased was earning Ksh.38,000/=. They got a grant which enabled them to file the suit. The deceased was buried the following day. He used to stay at his place of work while she was staying at home. She did not know where the deceased clothes were taken. She heard some people say the deceased was washing a motor vehicle while others said he was drawing water. They slaughtered cows during the mourning period. The deceased co-employees contributed Kshs.100,000. The appellant gave them Ksh.50,000 and deducted Ksh.50,000 from the contributions made by the employees.

PW3 Abdi Hassan Abdi worked for the appellant for two years and two months as a tipper driver. The deceased was also a driver at the company. The two used to work in different departments. On 17.5.2015 at about 4.30pm they were about to end their work for the day and were washing their motor vehicles at a dam. The deceased slipped and entered into the dam. He was initially standing outside the dam. They called for assistance and by the time he was removed he had drowned. It was a Sunday. They were using buckets to draw water from the dam for purposes of washing the vehicles. The deceased had open shoes, a black trouser and a green T-shirt. He was standing about 50 metres from where the deceased slipped. The dam had a polythene paper that was slippery and they would step on the polythene paper before drawing water. The water in the dam was being used to sprinkle the ground that was dusty. He denied that they were bathing at the dam. The deceased entered the dam with a yellow bucket. He saw the deceased when he was removed from the dam. The dam was fenced after the incident. The trucks used to ferry sand and ballast and used to be washed on Sundays. According to him it was not unusual for one to wash the vehicle while wearing a boxer.

DW1 Brazino John Fernandes is a manager with the appellant company who was based at the Logologo camp site. He was informed about the incident by the project manager. The accident happened before 5.00pm. He went to the scene at 6.00pm and was told that the body had been taken to nearby clinic. He went to the hospital and saw the deceased's body on a table. He informed the deceased's father and brother. Police took the body to Marsabit Hospital. The deceased was naked and only had a short. On Sundays they used to close their work at 5.30pm. The trucks could not be cleaned as they had no facility for cleaning them. One cannot clean the vehicles using hands as they are huge. The water in the dam is used to mix cement and sand. The dam was off the road. The drivers were not allowed to go to the pool and were to sit on the trucks after they close their work. The trucks were to be parked. The deceased's clothes were dry and were in the truck. He handed over the clothes and his mobile phone to the deceased's family. Nobody was allowed to carry any container capable of carrying diesel and if found he would be sacked. He was not at the scene when the accident occurred.

The appeal raises two issues:-

1. Who is to be held liable for the occurrence of the accident?
2. Are the respondents entitled to any damages? If so, to what extent.

From the evidence on record, the only eye witness to the accident is PW3. It is his evidence that the deceased was fetching water in the dam for purposes of cleaning the lorry/truck. PW3 was also cleaning his tipper. The evidence also proves that the dam was not fenced. It had a slippery polythene paper and the employees had to step on the polythene while entering the dam to draw water. The appellant's witness (DW1) testified that the trucks are too big to be cleaned using one's hands. The photographs show that these are ten wheel trucks/tippers and are not too high to be incapable of being cleaned by hand. According to PW3, they used to clean the trucks. I do agree with that contention. DW1 testified that on Sundays they used to end the work at 5.30pm. PW3 testified that the incident occurred at about 4.30pm and they were about to end their day's work. The accident occurred within the working period. The deceased was not on a frolic of his own. Whereas the appellant contends that there was a tap outside which could be used by the drivers to wash the vehicles at the same time it is alleged that the trucks were not to be washed. I have seen the photographs produced by the appellant and the purported tap is not visible. It is not marked on the photographs.

PW3 testified that the dam was fenced after the incident. The photographs show that indeed the dam was fenced. The photographs must have been taken after the accident. It is therefore clear that the workers could have accessed the dam. The employees were exposed to the dam. The photos show that it is not a huge dam although it is evident that when filled with water, it can pose danger to anyone if left open. The only warning sign reads "**No swimming.**" This does not prohibit fetching water from the dam. Only swimming was prohibited.

Mr. Kiogora contends that the deceased had gone to the dam to swim. That contention is not backed by any evidence. The mere fact that the deceased's clothes were found in the truck does not mean that he had gone to swim. The truck was parked next to the dam. PW3 testified that the deceased was carrying a yellow bucket and had removed his clothes. He was only having a short. This is in line with the respondent's evidence that the deceased was about to embark on a process of washing the truck before clocking out at 5.30pm. He could not have gone swimming during working hours. This allegation about swimming is not proved. The appellant's contention that staff were not allowed to carry any item capable of carrying liquids is equally not proved.

The trial Court observed as follows:-

"...PW3 testified that the dam was only fenced after the accident. That the polythene lining was slippery and the deceased slipped while drawing water to wash the motor vehicle. For the reason that the dam was not fenced, I find the defendant wholly liable for the accident. The work environment was not safe. This is a breach of statutory duty by the defendant in failing to provide a safe working environment. It is clear that the dam was fenced after the accident. The accident could have been avoided had the dam been fenced. Why did the defendant fence the dam after the accident? Clearly this was done to prevent other accidents.

It is evident that the deceased slipped and fell into the dam. The appellant could have made the dam in such a way that there is a section which is accessible and low enough for the employees to draw water from. The way the dam is built is that if one slips, he will immediately find himself in the deep end. Further, if it is true that the employees were not allowed to enter the dam, the appellant could have fenced off the premises and put a sign post warning staff not to enter the dam. The only sign post is that the dam is not to be used for swimming.

Taking into consideration that the deceased was alone while fetching water and observing that no one pushed him into the dam; I do find that the deceased is not free from blame. The defence filed by the appellant's counsel does not attribute contributory negligence on the part of the deceased. The statement filed by DW1 on 9.9.2016 cannot be taken as the appellant's defence. It is his personal statement and not a statement of the appellant company. Despite these above observations, I do find that the deceased could have been careful enough to avoid the accident. I do find that he was 30% to blame for the accident. I do apportion liability at 30% against the deceased and 70% against the appellant. The appellant exposed its employees to the dangers of drawing in the unfenced dam. No other steps were taken to prevent any such incidents. There is reference to an inquest having been done at Laisamis. The record does not show that an inquest was conducted. The Police Abstract gives an inquest No. 1 of 2015 but no proceedings are provided.

The next issue involves the assessment of quantum as awarded by the trial court. The seven (7) grounds of appeal as per the amended memorandum of Appeal dated 12th February, 2019 does not raise any issue on any specific award as assessed by the trial Court. I will take it that ground 7 of the grounds of appeal that the respondent did not prove his case on a balance of probabilities to include the amount of damage awarded by the trial court.

The trial Court awarded Ksh.100,000 for loss of expectation of life. Mr. Kiogora contends that the award is excessive and a sum of Ksh.80,000 ought to have been awarded. Mr. Kiogora relies on a 2015 decision. Assessment of damages involves the discretionary element of the Judicial officer. This Court cannot fault the trial court for having awarded Ksh.100,000 instead of 80,000. I do find that the award of Ksh.100,000 for loss of expectation of life is not excessive or inordinately high. The deceased was 25 years old and working as a driver. His life was cut short due to the appellant's negligence. Ksh.100,000 for loss of expectation of life is a fair award.

There is the issue of funeral expenses. The evidence does establish that the deceased's co-workers contributed Ksh.100,000/=. The appellant deducted Ksh.50,000/= from that contribution and recovered the sum of Ksh.50,000/= it had paid the deceased's family. In essence therefore, the appellant paid nothing to the family. The appellant did not meet the funeral expenses. Funeral expenses can be awarded as general damages or specifically proved. It is not usual to expect mourners to keep receipts for all the funeral expenses. Such expenses include washing of cooking utensils which may not be receipted. The mere fact that a deceased has to be buried connotes an expense being incurred. The plaintiff did not plead for burial expenses and the trial court did not make an award for burial expenses. The award of Ksh.20,000 as special damages is for the cost of obtaining the grant which enabled the respondent to file the suit. The claim is pleaded and a receipt was produced.

The last issue involves the award made for loss of dependency. Counsel for the appellant contends that the sum of Ksh.100,000 awarded under the Law Reform for loss of expectation of life ought to be deducted from the award made under the Fatal Accidents Act for loss of dependency. Counsel made reference to the **Kemfro case (Supra)**

In the case of **HELLEN WARUGURU WAWERU (suing as the legal representative of PETER WAWERU MWENJA (deceased) V KIARIE SHOE STORES LTD, Nyeri Civil Appeal No.22 of 2014** the Court of Appeal stated at para 10 as follows: -

This Court has explained the concept of double compensation in several decisions and it is that some courts continue to get it wrong. The principle is logical enough, duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kemfro case (Supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd via Meru express Services 1976 & another -vs- Lubia & another (No.2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia that:-

An award under the Law Reform act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act, it appears the legislation intended that it should be considered.

The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estate of deceased persons shall be in addition to and not derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law reform Act in respect of the same death.

The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4(2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgement of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.

The deduction of the entire amounts made under the LRA in this case was erroneous once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh.100,000 awarded for Loss of the expectations to sh.70,000 despite confirmation in the judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the Fatal Accidents Act award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

In line with the decision in the Kemfro case all what the court has to do is to take into consideration the award made under the Law Reform Act when making an award under the Fatal Accidents Act. There is no requirement that the former award must be deducted from the latter

award. Considering the fact that the deceased was a young man and married with one son I do find that there is no need to subtract the award under the Law Reform Act from that made under the Fatal Accidents Act. The deceased was working and the loss of dependency is based on the income paid monthly by the employer.

Mr. Kiogora contends that no payslips were produced. The evidence show that the deceased was working for the appellant. That is why his co-workers made contributions towards his burial. PW3 testified that the deceased was his co-employee with the appellant company although PW3 had left the company. The Plaint at paragraph 9 indicate that the deceased was earning Ksh.35,000 monthly.

The record shows that a payslip was produced as the sixth exhibit for the respondent. The payslip show that the deceased earned a gross pay of Ksh.38,123 and a net pay of Ksh.31,616. The trial court computed the loss of dependency using multiplicand of Ksh.31,616,

The deceased was 25 years old. A multiplier of 25 years was utilised with a dependency ratio of ?. Mr. Kiogora also proposed that dependency ratio. I am satisfied that the award of Ksh.6, 323,200 being loss of dependency as awarded by the court is reasonable. The award is worked out as follows:

$Ksh.31,616 \times 25 \times 12 \times ? = 6,323,000.$

In the end, I do find that the appeal partly succeeds on the issue of liability. The deceased is held 30% liable. The final award is as follows:-

Pain and suffering Ksh. 20,000

Loss of expectation of life – Ksh. 100,000

Loss of dependence Ksh.6,323,000

Special damages Ksh. 20,000

Total Ksh.6,463,000

Less 30% contribution 1,938,900

Ksh.4,524,100

The respondent shall have the cost awarded by the trial Court. Parties shall meet their own cost of this appeal.

Dated, Signed and Delivered at Marsabit this 9th day of April 2019

S. CHITEMBWE

JUDGE