



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 656 OF 2017

LANDMARK HOLDINGS LIMITED.....APPELLANT

-VERSUS-

ROBERT MACHARIA KINYUA (Suing as legal

representative of the estate of Grace Mwari

Kamotho (Deceased).....RESPONDENT

(Being an appeal from the judgment of Hon. G A. Mmasi SPM no. 4055 of 2015

delivered on 1st November 2017 at the Chief Magistrate Court at Nairobi in CMCC No. 4055 of 2015).

JUDGMENT

1) **Robert Macharia Kinyua**, in his capacity as the legal representative of the Estate of Grace Mwari Kamotho, deceased filed a compensatory suit against Landmark Holdings Ltd, the appellant before the Chief Magistrate's court Nairobi for the fatal injuries the deceased sustained in an industrial accident at the appellant's site at K.I.A.

2) When the suit came up for hearing parties recorded a consent order apportioning liability in the ratio of 70% : 30% in favour of the respondent and against the appellant. The matter therefore proceeded for hearing on quantum. In the end Hon. G. Mmasi, learned Senior Principal Magistrate gave judgment on quantum as follows:

· *Special damages* ksh.45,300/=

· *General damages for*

· *Loss of dependency* ksh.1,600,600/=

· *Total* ksh.1,645,300/=

· *Less 30% Contribution* ksh. 493,590/=

· *Net total* Ksh.1,151,710/=

The appellant was also awarded costs and interest.

3) Being aggrieved by the award on quantum, the appellant preferred this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased of closely related age.

ii. THAT the learned magistrate erred in law in making such a high award on loss of dependency as to show that the magistrate acted on a wrong principle of law.

iii. THAT the learned magistrates award on damages was so high as to be entirely erroneous.

iv. THAT the learned magistrates award was made without considering the age of the deceased, and hence applying a multiplier that was high and adopting retirement age which was speculative contrary to existing jurisprudence.

v. THAT the learned magistrate erred in law and fact y adopting a multiplier that was so high as to show that the acted on the wrong principal and failed to consider that the deceased was a casual worker.

vi. That the learned magistrate erred in law and fact in applying a wrong ratio and high multiplier and failed to consider the likely uncertainties in life in adopting the multiplier.

vii. That the whole judgment on quantum was against the weight of evidence before the court and without any consideration to the pleadings and evidence before the court.

4) When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions. It is the submission of the appellant that the damages awarded were not commensurate with other unmarried deceased adults like the deceased. It was pointed out that no monthly earnings could be discerned from the list of documents which were tendered as exhibits by consent.

5) The appellant further submitted that no oral testimony to proof loss of dependency was adduced. The appellant also pointed out that the certificate of death which was produced as an exhibit in evidence indicated that the deceased was employed as a casual but not as a site supervisor as pleaded. It is submitted that it was not therefore possible to its verify the earnings of such a worker hence the learned trial magistrate erred when she relied on a minimum wage of another occupation.

6) The applicant argued that the trial court should instead have applied the minimum wage of a casual as the multiplicand. The appellant suggested that the multipland of ksh.7,586/= as opposed to ksh.10,000/=. It was also argued that the trial court did not give reasons as to why it chose to apply the muplicand of ksh.10,000/= and any reasons given would not justify the multiplicand chosen.

7) The appellant further argued that the trial court failed to take into its submissions and authorities relied upon but instead heavily relied on those of the respondent.

8) The respondent is of the submission that the damages awarded is sufficient and within the law and in consideration of the fact the deceased was a single mother and the sole bread winner to her two minor children.

9) The respondent further argued that the award on loss of dependency was justified because the deceased was unmarried with two children who solely depended on her.

10) In her judgment, the learned Senior Principal Magistrate stated that there was no evidence to show the salary and or allowance the deceased earned consequently she stated that she was relying on the minimum wage of ksh.10,000/= per month. She also gave a multiplicand of 20 years and further took into account the fact that the deceased was survived by two (2) children.

11) The matter before this court is an appeal against the award on damages. The principles to be considered by an appellate before disturbing an award given by a trial court are well settled. In the case of **Kemfro Africa Ltd t/s Meru Express Service & Another =vs= Lubia & Another (1998) eKLR**, the Court of Appeal restated those principles as follows:

“..... it must be satisfied that either 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.”

12) The record shows that the respondent had stated that the deceased was a supervisor earning ksh.500/= per day which translated to ksh.12,000 per month. The appellant contested that figure arguing that there was no evidence to back and instead proposed that a minimum wage of Ksh.10,000/= should be applied.

13) The figure suggested by the appellant was taken up and applied by the learned Senior Principal Magistrate. The appellant has now proposed another figure of ksh.7,586/= as the minimum applicable wage. This is a totally new point raised on appeal. The new figure was not put to the attention of the learned Senior Principal Magistrate. The issue as to whether she was employed as a casual did not also arise before the trial court. I decline to take into account the two new issues. The learned Senior Principal Magistrate was misled by the appellant proposal that at that time the minimum wage was ksh.10,000/=. The appellant cannot now be allowed on appeal to introduce a new figure which the trial court had no benefit to interrogate.

14) A careful examination of the trial court’s judgment will reveal that the learned Senior Principal Magistrate considered all the relevant material placed before her by both sides before making her decision. She cannot therefore be faulted.

15) In the end, I find no merit in this appeal. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 14th day of June, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent