



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 7 OF 2017

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

PHILIP SUMBA JULAYA

(Suing as the administrator and personal representative of the estate of

JAMES JULAYA SUMBA.....RESPONDENT

(being an appeal from the judgment and the decree of the Senior Principal Magistrate's Court at Kakamega in Civil Suit No. 477 of 2015)

JUDGMENT

1. The respondent has sued the appellant at the lower court seeking for general and special damages after the respondent's son was knocked down and killed by the appellant's motor vehicle that at the time of the accident was being driven by the appellant's employee. Parties entered consent on liability at the ratio of 70:30 in favour of the respondent against the appellant. The trial court proceeded to assess the damages as follows:-

(a) Pain and suffering

- Ksh. 30,000/- =Ksh. 21,000/= (after 30% contribution)

(b) Loss of expectation of life

- Ksh. 200,000/- =Ksh. 140,000/= (after 30% contribution)

(c) Loss of dependency

- Ksh. 543,600/- =Ksh. 380,000/= (after 30% contribution)

(d) Special damages =Ksh. 48,370/=

T O T A L =KSH. 589,890/=

2. The appellant was aggrieved by the award and filed the instant appeal.

3. The grounds of appeal are that:-

1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.

3. The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly sustained by the respondent.

4. The learned trial magistrate erred in failing to evaluate the evidence tendered judiciously.

The Pleadings and Evidence

4. The respondent pleaded that the deceased died at the age of 27 years.

He testified in court that the deceased used to help him in the farm and used to make about Ksh. 16,000/= after selling sugar cane.

The Award

5. The trial court awarded Ksh. 30,000/= for pain and suffering, Ksh. 200,000/= for loss of expectation of life. It used the minimum wage of 5,438/= as the multiplicand, a multiplier of 30 years and a dependency ratio of $\frac{1}{3}$. The loss of dependency was calculated as follows:-

$$5,438 \times 25 \times 12 \times \frac{1}{3} = 543,600$$

Submissions in the appeal

6. The advocates for the appellant, **Ogejo, Olendo & Company Advocates** submitted that the award of Ksh. 30,000/= on pain and suffering and Ksh. 200,000/= for loss of expectation of life were inordinately high and contrary to comparable recent decisions where the deceased died on the spot. The advocates cited the cases of **James Gakinya Karienyé & Another (Suing as legal representative of Estate of David Kelvin Gakinya (Deceased) –Vs- Perminus Kariuki Githinji** where a sum of Ksh. 10,000/= for pain and suffering and Ksh. 80,000/= for loss of expectation of life were awarded for death taking place immediately after the accident and **Harjeet Singh Pandal –Vs- Hellen Aketch Okudho (2018) eKLR** where an award of Ksh. 30,000/= for pain and suffering was reduced to Ksh. 10,000/= where the deceased had died on the spot and Ksh. 100,000/= affirmed for loss of expectation of life. The advocate also cited the case of **Kenya Wildlife Services –Vs- Goffrey Gichuki Mwaura (2018) eKLR** where the court reduced an award of Ksh. 150,000/= to ksh. 100,000/= for loss of expectation of life.

7. For loss of dependency the advocates submitted the multiplicand, the multiplier and the dependency ratio adopted by the trial court was reasonable but faulted the court in falling to the awards made under the Law Reform Act so as to avoid double compensation as per the principle laid in **Kemfro Africa Limited t/a Meru Express Services (1976) & Another –Vs- Lubia & Another (No.2) (1985) eKLR**.

8. The advocates for the respondent, **C. M. Mwebi & Co. Advocate**, submitted that the awards on pain and suffering and loss of expectation of life are very reasonable and are not ordinarily high. In respect to the issue of double compensation under the Law Reform Act and the Fatal Accidents Act, the advocates cited the case of **Anthony Ndereva Gichovi –Vs- Rahab Wanjiru Macharia and Anne Wambui Macharia (suing as the administrators of the Estate of John Macharia Mwaura (deceased))** where **Sergon J.** held that:-

“What is required in order to avoid double compensation is for the court to have in mind and (therefore) take into account the award under the Law Reform Act when making an award under the Fatal Accidents Act. the figure of Ksh. 1,600,000/= awarded under the Fatal Accidents Act was not so excessive as to suggest that the trial court did not take into account the award of Ksh. 100,000/= for loss of expectation of life awarded under the Law Reform Act.”

Analysis and Determination

9. This is a first appeal. It is the duty of a first appellate court to re-evaluate the evidence draw its own conclusions – **See Selter –Vs- Associated Motor Boat Co. Limited 1968 E.A. 123**. The grounds under which an appellate court may disturb an award of damages by a lower court were stated in the case of **Kemfro Africa Limited t/a Meru Express Services –Vs- A. M. Lubia, C.A. 21 of 1984 (1882 – 1988) I KAR 727** where the Court of Appeal held that:-

“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 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.”

10. The deceased in the instant case died on the spot. The trial court made an award of Ksh. 30,000/= for pain and suffering. The advocate for the appellant contends that the award was inordinately high when considered that the deceased died on the spot. That an award of Ksh. 10,000/= could have been sufficient compensation.

11. As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.

12. In **Josephine Kiragu –Vs- Vyas Hauliers Ltd (2017) eKLR** where the deceased had died instantly, Njoki Mwangi, J. held that an award of Ksh. 10,000/= for pain and suffering was on the lower side and increased it to Ksh. 30,000/=.

13. In the case of **Sukari Industries Limited V Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] EKLR** where the deceased had died immediately after the accident and the trial court had awarded Ksh. 50,000/= for pain and suffering, Majanja J. held that:

[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that the sum of Kshs 50,000 awarded under this head is unreasonable."

14. In the case of **Simon Bogonko V Alfred Mongare Mecha & Another (Suing as the Legal Representatives of the Estate of Akama Mong'are (Deceased) [2019] ECLR and Omanga Fish Limited V CKB & JM (Suing as the Legal Representatives of The Estate of JMM (Deceased) [2019] ECLR** Maina J. reduced awards of Ksh. 100,000/= to Ksh 20,000/= for pain and suffering where the deceaseds in the cases had died on the spot.

15. In my view the award of Ksh. 30,000/= for pain and suffering is not manifestly excessive as there are High Court authorities to support it. The award will therefore stand.

16. The trial court awarded Ksh. 200,000/= for loss of expectation of life. the appellant contends that the figure is excessive and that an amount of Ksh. 100,000/= would have been sufficient compensation.

17. In **Mercy Muriuki & Another –Vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the Court observed that:-

"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

18. In the case of **Moses Akumba & Another –Vs- Hellen Karisa Thoya (2017) eKLR** Chitembwe J. held that an award of Ksh. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In the cases of **Patrick Kariuki Muiruri & 3 Others V Attorney General [2018] eKLR** Serгон J. made an award of Ksh. 200,000/= under this heading. In **Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) –V- Mogogosiek Tea Factory Co. Ltd & Another [2018] eKLR** an award of Ksh. 200,000/= was made.

19. There are therefore some High Court authorities to support the award made by the learned trial magistrate. It has not been shown that the trial court used the wrong principles in making the award for loss of expectation of life. That this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award. It is therefore my considered view that the award of Ksh. 200,000/= for loss of expectation of life was not excessive.

20. The appellant also submitted that the trial magistrate did not make any consideration of the award made under the Law Reform Act when he made the award under the Fatal Accidents Act and thus made awards that amounted to double compensation. His advocates relied on the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727**.

21. This issue was settled in the case of **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited [2015] ECLR** where the Court of Appeal held that

"19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law."

20. This Court has explained the concept of double compensation in several decisions and it is surprising 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 issues of duplication does not arise.

25. The words 'to be taken account' and 'to 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 judgment 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."

22. In view of the above there is no legal requirement for the court to deduct the amount awarded under the Law Reform Act from the award made under the Fatal Accidents Act. The argument by the advocates for the appellant on the issue does not stand.

The upshot is that the appeal is unmerited and is accordingly dismissed with costs to the respondent.

Delivered, dated and signed in open court at Kakamega this 13th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Olando for appellant

No appearance for respondent

Appellant - absent

Respondent - absent

Court Assistant - George

30 days right of appeal.