



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.23 OF 2018

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

BRENDA AKINYI ODHIAMBO (suing as the Legal Representative of the

Estate of **PAUL ODHIAMBO OKOTH**–(Deceased).....**RESPONDENT**

(Being an appeal from the Judgment/Decree of Hon. M.A. Ochieng, SRM,

delivered on 28th June, 2018 in Ndhiwa SRMCC No.3 of 2017)

JUDGMENT

[1] The claim by the respondent, Brenda Akinyi Odhiambo, in her capacity as the legal representative of the deceased, **Paul Odhiambo Okoth**, against the appellant, **West Kenya Sugar Company Limited**, in **SPMCC NO.3 of 2017** at Ndhiwa was for damages and arose from a road traffic accident which occurred on 8th October 2016 at Wachanyo along Ndhiwa-Sori Road involving the appellant's Motor Vehicle Reg. No. KBT 891Z Fuso Lorry ZE 3913 trailer and the deceased's Motor cycle Reg. No. KMDW 533 U Boxer.

[2] It was alleged that on the material date, the appellant's said motor vehicle was so carelessly and/or negligently driven such that it lost control and hit the deceased's motor cycle thereby occasioning Fatal injuries to the deceased and his pillion passenger/s.

The respondent therefore made a claim for damages under the Law Reform and Fatal Accidents Acts.

[3] At the trial, evidence was led by the respondent (**PW1**) and her witness, **Vincent Otieno Okoth (PW2)**.

The appellant did not lead any evidence, but in the course of the trial the parties entered a consent on liability to the effect that judgment be entered in the ratio of 60:40 in favour of the respondent.

The quantum of damages remained the only issue for determination by the trial court.

[4] In that regard, judgment was entered against the appellant as follows:-

[i]Under Law Reform Act:

(a) Kshs.10, 000/= pain and suffering.

(b) Kshs.100, 000/= loss of life expectation.

[ii]Under Fatal Accidents Act:

(c) Loss of dependency –Kshs.1, 642, 380/80 i.e.

Kshs.6, 415/55 x 32 x $\frac{2}{3}$ x 12.

[iii] Total amount – Kshs.1, 752, 380/80 less 40% contribution

= Kshs.1, 051,428/48

[5] Being dissatisfied with the award, the appellant preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 13th July 2018.

The hearing of the appeal proceeded by way of written submissions. Accordingly, the appellant filed its submissions dated 3rd July 2019, through the firm of **Ogejo Olendo & Co. Advocates**.

The respondent's submissions dated 12th July 2019, were filed on her behalf by the firm of **Veronica Migai & Co. Advocates**.

[6] This court has given due consideration to the grounds of appeal and the rival submissions with full knowledge that it's role was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **Selle –vs- Associated Motor Boat Co. Ltd. [1965] EA 123.**)

In that regard, the evidence adduced by the respondent indicated that the deceased died at the age of twenty three (23) years and was a motor cycle taxi operator cum farmer who made a monthly income of Kshs.20,000/=. His dependents included his wife (the respondent) and their five (5) year old child. His mother and three brothers also depended on him.

[7] In arriving at its conclusion, the trial court made findings of fact that the deceased died on the same day of the accident having suffered much pain due to the injury on his skull. That, he was aged 23 years and was a motor cycle rider cum farmer by occupation. That, he enjoyed robust health and was expected to have worked upto the age of fifty five (55) years consideration being given to life's unexpected occurrences.

[8] The trial court also found that there was no documentary evidence supporting the alleged monthly income of Kshs.20, 000/=. but that the deceased had dependents for whom $\frac{2}{3}$ rd of his earnings was expended. The court therefore calculated loss of dependency on the basis of the applicable statutory minimum monthly wage (i.e. Kshs.6, 415/55) as the multiplicand, a multiplier of thirty two (32) years and a dependency ratio of $\frac{2}{3}$ ^{rds}.

[9] In ground one and two of the appeal, it is contended that the trial court arrived at a wrong conclusion by treating the evidence and submissions on quantum superficially and by ignoring the principles applicable in awarding quantum of damages as well as relevant authorities on quantum.

In ground three and four, the appellant raises issue with the multiplier of 32 years (not 24 years as shown in the memo of appeal) and contends that it was inordinately high regard being given to life imponderables. The appellant complained that the award made under the Law Reform Act was not discounted from the total amount awarded by the trial court.

[10] With regard to appeals on quantum of damages, the applicable

principles were set out by the Court of Appeal in the famous case of **Kemfro Africa Limited & Another –vs- A.M. Lubia & Another (1982-88) 1 KAR 777**, where it was held that:-

“The principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for 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.”

(See also, **Butt –vs-Khan (1981) KLR 349**).

[11] Applying those principles to this case, this court must and hereby overrules grounds one and two of the appeal and the submissions in respect thereof. There is nothing therein suggesting that the trial court treated the evidence and submissions on quantum superficially or that

the court ignored the applicable principles and relevant authorities on quantum. Indeed, there was no demonstration whatsoever by the appellant that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one.

[12] With regard to ground three, not only was the respondent's evidence undisputed, the trial court in arriving at its conclusions took into account imponderables of life in applying a multiplier of 32 years.

And, in the absence of proof of monthly income, the trial court properly adopted a multiplicand of Kshs.6, 415/55 based on the applicable

statutory minimum wage rate.

There was no dispute that the deceased being a motor cycle rider cum farmer earned a monthly income from these trades. It was imperative that the applicable minimum wage rate be adopted to calculate loss of dependency as there was no documentary proof of the alleged monthly earnings of Kshs.20,000/=.

[13] As for damages under the Law Reform Act, the amounts awarded

by the trial court were reasonable and a reflection of the conventional figures normally awarded by most courts for pain and suffering as well as loss of life expectation.

In ground four of the appeal, the appellant contended that the trial court erred in failing to deduct the award under the Law Reform Act from the total award made by the court. This contention is however, not sustainable considering that in the **“Kemfro Africa case”** (supra) a distinction was made between the words **“to be taken into account”** and **“to be deducted”**.

[14] This distinction defuses the belief that it is mandatory to discount the award made under the Law Reform Act from the total or cumulative award.

In any event, the Law Reform Act provides that the right conferred for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on defendants under the Fatal Accidents Act. It would therefore not be double compensation if the beneficiaries of the estate of the deceased were also the dependents of the deceased. In some cases, the beneficiaries may not necessarily be the defendants.

[15] In sum, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

J.R. KARANJAH

JUDGE

23.07.2019

[Delivered and signed this 23rd day of July, 2019]