



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO 36 OF 2017

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

TIMOTHY WEKESA KHAEMBA.....1ST RESPONDENT

MARY NASWA WAFULA.....2nd RESPONDENT

(suing as the Administrator & legal representative of the Estate of

EMILY NASIMIYU KHAEMBA - Deceased)

[An appeal from the judgment and decree of Senior Principal Magistrate, Kimilili In

Civil Suit No.74 of 2016 delivered on the 10-11-2017]

JUDGMENT

By plaint dated 31st May 2016, the respondents in this appeal sued the Appellant for orders for general damages, special damages and cost of the suit plus interest at court rate for accident that occurred on or about 30th August 2015 involving motor vehicle registration number KTCB 801H Mahindra and the deceased who was a pillion passenger aboard moto cycle registration No. KMDH 775Q TVS Star at Ndivisi Junction along Webuye - Kitale Road. The deceased was fatally injured as a result of the said accident hence the Respondents brought a claim under Law Reform Act and the Fatal Accidents Act.

By Judgment of the Senior Resident Magistrate, D.O. ONYANGO Judgment was entered in favour of the Respondents against the Appellant on quantum of damages. General damages and special damages of Kshs.1,128,975/=. The Appellant was aggrieved by both the finding on liability and the quantum of damages and appealed against the said award on the following grounds:

- i. That the learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to wrong conclusion on the same;*
- ii. That the learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum dated in the written submissions presented and filed by the appellant.*
- iii. That the learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly sustained by the Respondent.*
- iv. That the learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously Respondent.*

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Mulama for the appellant submitted on the ground of appeal which raised pertinent issue being that quantum of damages awarded was too high. He submitted that the trial magistrate applied wrong principles while awarding damages and thereof arrived an award that was excessive and inordinately high. He submitted that to the contrary there was no evidence whatsoever leading to show that the deceased died while being taken to hospital and an award of Kshs.20,000/= for pain and suffering was therefore excessive and proposed a standard award of kshs.10,000/= relying on authority in *Harjeet Singh Pandal V Hellen Aketch Okudho[2018] eKLR*. He also submitted that award of Kshs.120,000/= for loss of expectation of life was excessive in nature placing reliance on *Chepngeno Mutai v Patrick Wanjeru Oloo & Another HCC. 85 of 2000*. He also submitted that that trial court gravely misinterpreted the provision to use of the multiplier and multiplicand and he submitted summarily that trial magistrate grossly misapprehended the applicable principles facts and evidence and made an inordinately high and excessive award in damages and thereof the same should be varied.

The Respondent submitted through its counsel on record that court's interference can only be justified when the appellate court can only be justified where trial court applied wrong principles hence arriving at erroneous estimate relying on the authority of ***Naivasha HCCA No.44 of 2015 Kenya Pipeline Company V Lucy Njoki Njuru(suing as the legal representative of the estate of John Wamae - Deceased) [2016]***.

He submitted on pain and suffering that it is evidence of 1st Respondent that deceased died in Kimilili District Hospital and as such the award of Ksh.20000/= was justified as deceased did not die on the spot.

He submitted on loss of expectation that the appellant did not tender any evidence to show the deceased was not in good health thereof the **Kshs.120,000/=** he submitted that a multiplier being a method of assessing damages and not principle in law makes it discretionary and not binding on trial magistrate and submitted that the learned trial magistrate did not misdirect himself in assessing the quantum of damages. He submitted that the appeal lacks merit and should thereof be dismissed with costs.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of ***Selle V Associated Motor Boat Company Ltd [1968] EA 123*** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

The evidence before trial court was that PW1 Timothy Wekesa Khaemba he knew the deceased and she died on 30th August 2015 and relied on his statement that he had filed in court. He produced death certificate and letter from chief showing beneficiaries of deceased to that effect.

It is not in dispute that the deceased was a pillion passenger aboard moto cycle registration No.KMDH 775Q TVS Star at Ndivisi Junction along Webuye- Kitale Road. The deceased was fatally injured as a result of the said accident.

The defence relied on evidence and judgement on liability in CC number 111 of 2015 to apply in this case. I have perused the court proceedings and it is my finding that the parties agreed that the issue of liability in this case was to await determination of liability in CCC No. 111 of 2015 therefore the only issue for determination is whether the quantum of damages were properly assessed and whether this court can grant orders sought.

On issue of quantum the principles upon which appellant court can consider in reversing the finding of an award of a lower court are well stated in ***Butler Vs. Butler CIVIL APPEAL NO.49 OF 1993***. The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have been considered or that the award is so excessive or low as would reflect on erroneous application of the principles of assessment of damages. On issue of special damages the trial court awarded special damages on what was proved and I have analyzed and I find the same is in order.

On issue of time of death the Respondent was awarded damages of Kshs.20,000/= and Appellant is praying for an award of Kshs.10000/= .It is clear from evidence adduced by PW1 that the deceased died on the spot per his statement dated 31st May 2016 which statement he adopted during the hearing. I have also perused the death certificate which indicate that the deceased which to my finding he died on the spot and thereof since award of damages is discretion of the trial court award of Kshs.20,000/= was proper and I won't interfere with the same.

On issue of expectation the trial court held that the deceased was 43 years old at the time of death and awarded Kshs.120,000/= ,according to evidence adduced by PW1 deceased was in good health and a business woman when she met her untimely death and the court awarded kshs.120,000/=. There is no evidence that was tendered by the appellant that the deceased was not in good health thereof award under this head was properly done by the trial court.

With regard to lump sum amount awarded, the trial court awarded a lump sum amount of Kshs.1200,000/=.It is my finding that general damages under the Law Reforms Act must be deducted in full from the total lumpsum award made under the Fatal Accidents Act as the Deceased's estate cannot benefit twice. I hereby order as follows:

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|-------------------------|--------------------------------|
| i. Liability | 80:20 |
| ii. Pain and suffering. | Kshs.20,000 /=- |
| iii. Special damages. | Kshs.20,000/= |
| iv. Funeral expenses. | Kshs.50,000/= |
| v. Loss of expectation. | Kshs.120,000/= |
| vi. Loss of dependency | Kshs.1,200,000/= |
| Sub -total award. | <u>Kshs.1,410,000/=</u> |
| Less 20% contribution | Kshs.282,000/= |
| Less general damages | Kshs.120,000/= |

Grand Total. **Kshs.1,008,000/=**

I so order.

Dated and Delivered at **Bungoma** this 11th day of **July**, 2019.

S.N.RIECHI

JUDGE