



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 177 OF 2016

JACKLINE NDULU MUSYOKA & 2 OTHERS (Suing as Legal Reps of the

Estate of **ANDREW MUSYOKA MUTUA**.....**APPELLANTS**

VERSUS

DELMONTE KENYA LTD.....**RESPONDENT**

(An appeal from the Judgment of the Chief Magistrate's Court at Thika (S. Telewa Resident Magistrate) dated 2nd August 2013 in Civil Case no 651 of 2011

JUDGMENT

1. The Appellants filed this appeal as the legal representatives of the deceased (Andrew Musyoka Mutera). The deceased's wife filed the claim for damages in the lower court under both the Fatal Accidents Act and the Law Reform Act. A consent on liability was filed and judgment was entered on the same in the ratio of 75:25 in favour of the Plaintiff against the defendant.

2. The trial court took the evidence of Jackline Ndungu (PW1) who is the widow of the deceased, for purposes of assessing quantum. The respondent did not call any witness. At the end of the trial the learned trial Magistrate found for the Appellants and gave the following awards:

Fatal Accidents Act

(i) Special damages	1,205/-
(ii) Loss of dependency	409,680/-
(iii) Loss of expectation of life	80,000/-

Law Reform

Pain & suffering	<u>10,000/-</u>
TOTAL	<u>500,885</u>

Costs and interest were awarded to the Appellants.

3. The Appellants were unhappy with the award made as they expected much more than what was given. They filed this appeal raising the following grounds.

(i) That the learned magistrate erred in law and in fact in failing to consider the evidence adduced by the Plaintiff.

(ii) That the learned magistrate erred in law and in fact in awarding the Appellant a sum of Kshs, 363,163.75 after contribution despite the evidence adduced by the Appellant..

(iii) That the learned magistrate erred in law and in fact in failing to appreciate that the deceased was aged 38 years at the time of his death and hence arrived at a wrong conclusion on the damages awardable.

(iv) That the learned magistrate erred in law and in fact in failing to appreciate that the deceased was married with children hence arrived at a wrong conclusion on the damages awardable.

(v) That the learned magistrate erred in law and in fact in failing to consider the minimum wage in awarding damages.

(vi) The award of the trial Court was manifestly low.

4. The Appeal was disposed of by way of written submissions. M/s Shem Kabogo for the Appellant relying on the case of **Makario Makonye Monyancha v Hellen Nyangena Kisii HCCC No 113 of 2012** submitted that the award of Kshs 10,000/- for pain and suffering was too low compared to the injuries suffered.

5. On loss of expectation of life counsel submitted that the award of Kshs 80,000/- was too low considering that the deceased was aged 35 years at the time of his death. He urged the court to award Kshs 100,000 and relied on the case of **Floice Adema Onami v Keza Muthoni Nguire and others Msa HCC No. 301 of 2002** for this suggestion.

6. Under the Fatal Accidents Act (Loss of Dependency) counsel submitted that the deceased died aged 35 years old having left behind a wife and three children together with his mother who wholly depended on him. He suggested a dependency ratio of 2/3. He contended that the multiplier of 15 years was too low and proposed one of 20. He argued that the deceased would have lived and worked beyond the retirement age of 60 years. He relied on **Regina Wangeci vs Eldoret Express Ltd Nakuru HCCC NO 44/07** and **Hyder Nthenya Musili & Another v China WU YI Ltd & Another [2017]eKLR.**

7. He submitted further on the issue of the deceased's earning by acknowledging that the pay slip indicating an earning of Kshs. 1707 from 6th November 2010 to 19th November 2010 amounting to 13 days did not represent what the deceased earned after every two weeks. He urged the court to find that there was no sufficient proof of monthly earnings and in such circumstances, the minimum basic salary should apply.

8. Counsel thus submitted by urging the court to re-assess the award by the trial court as follows:-

- Pain and Suffering Kshs. 150, 000
- Loss of Expectation of Life Kshs. 100, 000
- Loss of dependency Kshs. 1,600,000

9. The appeal was opposed by the Respondent through M/s Avedi & company who relied on the case of **H. Young Co. Ltd v James Orangi Kisii HCCC on 207 of 2009**. He proposed the following awards:

General damages	Kshs. 300,000
Special damages	<u>Kshs. 36,400</u>
	Kshs. 336,400
Less 25%	<u>Kshs. 84,100</u>
TOTAL	<u>Kshs. 252,300.</u>

10. Counsel supported the Judgment by the trial court and urged this court to uphold it and dismiss the Appeal with costs.

11. In her evidence Jackline Ndungu who testified as PW1 stated that the deceased was her husband. On 28/3/2011, she received information that the deceased had an accident and ongoing to check up on him the following day, she found him dead and the body having been taken to the mortuary. She produced letters of administration from the High Court (**PEXB.1**). She produced the deceased's death certificate (**PEXB. 3**), police abstract as (**PEXB.4**), post mortem report (**P EXB.5**), report on owner of motor vehicle (**PEXB. 6A**).

12. She said the deceased lived a normal life, looking for work each day and getting paid. She produced the deceased's pay slip dated 6th November 2010(PEXh.7). She also stated that the deceased used to buy food, pay school fees for their 3 children; that he could have worked longer had he not died from the accident. She confirmed that the respondent took care of all the funeral expenses.

13. This being a first appeal I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to see or hear the witnesses and I must give an allowance for that. See **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: (Okubasu , Githinji & Waki JJA).**

I should also bear in mind that it is not open to this court to review the findings of the trial court just because it would have found differently had it been hearing the matter for the first time.

14. I have considered the pleadings, evidence on record, grounds of appeal, the submissions and authorities by both counsel. The appellant raised six(6) grounds of appeal. I have however considered them and the issues I find falling for determination are:

(i) Whether the trial court erred in law and fact in failing to consider the minimum wage in awarding damages?

(ii) Whether the award of the trial court was manifestly low?

Issue No (i) Whether the trial court erred in law and fact in failing to consider the minimum wage in awarding damages?

15. M/s Shem Kabogo for the Appellants submitted that the pay slip indicating earning of Kshs. 1707 from 6th November 2010 to 19th November 2010 amounting to 13 days did not represent what the deceased earned after every two weeks. I note that the supposed pay slip produced by PW1 shows dates in November 2010 while the deceased died on 28th March 2011. The pay slip produced by PW1 was not therefore conclusive as to the exact amount the deceased was earning as salary at the time he met his death.

16. Furthermore, the deceased being a casual laborer, the amount of money he earned varied or was determined by the amount of work done. The same could not therefore be pegged on a payslip as the pay was not static. It is not only documentary evidence that can prove income as was held in Nicholas Njue Njuki vs Elid Mbugua Kahuro [2014] Eklr and Gachoki Gathuri(suing as legal rep. for the Estate of James Kinyua Gachoki(Deceased) v John Njagi Timothy & 2 Others [2015]Eklr where the trial court used the minimum wage to ascertain the earnings of the Deceased in similar circumstances.

17. In the instant case, the deceased died in March 2011. As per Legal Notice No. 97 of the Labour Institutions Act dated 18th June 2010 the deceased as an unskilled employee was entitled to Kshs 3,347 per month. There was no evidence adduced to show whether the deceased who was a casual unskilled used to work for an entire month or a few day as in a month.

18. PW1 said the slip for Kshs 1,707/- (PEXB7) was payment for one week, and he used to be paid weekly but there were days he was not working. If that is the case then he was earning Kshs 1707 x4 =Kshs 6828/- which cannot be correct because this figure is far beyond the monthly entitlement of an unskilled labourer at the time. With the distorted information it would be safe to work with the lawful payment of Kshs 3,347/- p.m.

Issue No (ii) Whether the award of the trial court was manifestly low?

19. It is an established principle of law that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014] eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

20. In the present case, PW1 testified that she was informed that the deceased was involved in an accident. On going to see the deceased the following day, she found that the deceased had died. It is not clear whether the deceased died soon after the accident or at a hospital. Evidence ought to have been adduced to confirm that. There was no such evidence adduced. The trial court awarded Kshs. 10,000/- for pain and suffering and I find no reason to make me interfere with it.

21. The deceased was married with 3 children and other dependants. He was aged 35 years (PEX3). The learned trial magistrate used a multiplier of 15 years giving him a life line of 50 years but his finding was that he could have worked upto the age of 65 years. If that was the case he ought to have used a multiplier of 30 years and not 15 years. I will come to that issue later.

22. On whether the damages awarded under the Law Reform Act should be subtracted from the award made under the Fatal Accidents Act on account of double enrichment, I am guided by the law and practice where a claimant get awards for loss of life both under the Law Reform Act and the Fatal Accidents Act as explained by the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR as follows:

“ 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 issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro 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 Kenfro Africa Ltd t/a 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:-

“6 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.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased

persons shall be in addition to and not in 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.

8. 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 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.”

23. I note in this regard that the evidence by PW1 was that the deceased used to support her and their three children, and in addition it was pleaded that he supported his parents. There were thus other beneficiaries of his estate who will benefit from the award of loss of expectation of life, other than the dependants getting compensation under the Fatal Accidents Act.

On the award of damages for loss of dependency under the Fatal Accidents Act, it is necessary to determine the deceased's income, the dependency ratio of his dependants and the multiplier to be used. The manner of assessment of damages for loss of dependency was aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another**, Nairobi HCCC No. 1638 of 1988 as follows;

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

24. The dependency ratio of 2/3 used by the trial court suffices in light of the evidence as to his dependents, and as the deceased was 35 years of age at the time of his death, it is possible he could have worked for another 20-25 years. This is after considering the vicissitudes of life as the official retirement age varies between 55-60 years. Upon taking into account the totality of the evidence and the contingencies of life I find a multiplier of 20 years to be appropriate.

25. The loss of dependency would thus be calculated as:

$$2/3 \times 20 \times 347 \times 12 = 535,520/-$$

For loss of expectation of life it is noted that the deceased was still young and full of life. The trial court awarded Kshs. 80,000/-. I will increase it to Kshs 100,000/-.

26. In the award of special damages, the appellant produced receipts for letters of administration and was awarded Kshs. 1,205/= which was pleaded and proved.

29. In the end, I make the following finding:-

a) Liability 75:25 agreed

b) Quantum

Fatal Accident Act

i) Special damages Kshs 1, 205.00

ii) Loss of dependency Kshs 535,520.00

Law Reform

i) Loss of expectation of life Kshs 100,000.00

ii) Pain and Suffering Kshs. 10,000.00

TOTAL Kshs. 646,725.00

Less 25% contributory negligence

TOTAL Kshs. 485,044.00

Final Orders

1. The Appeal is allowed
2. The Judgment by the lower court is set aside and substituted with a judgment in the sum of Kshs 485,044/- (Four hundred and eighty five and forty four shillings).
3. The Appellant will get full costs in the lower court and half costs for the Appeal.

Signed and dated this 4th day of October, 2018 at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE