REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.139 OF 2016

TONONOKA ROLLING MILLS.....APPELLANT

VERSUS

RODA MUNYIVA KIMEU AND CHARLES NZIOKI KIMEU (suing as personal

Representatives of the Estate of **ROBERT NDAVI KIMEU (DECEASED)....RESPONDENTS**

(Appeal from the Judgment of Honourable Elizabeth Usui, Senior Principal Magistrate at Nairobi delivered on 11th December, 2015 in CMCC No. 7603 of 2013)

JUDGMENT

The Respondents, who were the plaintiffs in the case before the trial court, filed the plaint dated the 21st December 2012 against the Appellant claiming both special and general damages and the costs of the suit.

They filed the suit as the personal representatives of the Estate of Robert Ndavi Kimeu who died in an accident that was alleged to have occurred on the 4th day of December, 2010 when the deceased was in the course of discharging his duties as a furnace charger, at the Appellant's industry at Dandora in Nairobi.

It was pleaded that, on the material day, the deceased was in the course of his duties when suddenly, molten metal exploded in the furnace and splashed over him and his colleagues thereby occasioning him 95% burns from which he died the same day. The Respondents contended that the accident and the fatal burns injuries to the deceased were solely caused by the negligence of the Appellants and/or his employees, servants or agents. The particulars of negligence as aforesaid are set out in paragraph 6 of the plaint and those of the dependants and loss, are set out in paragraph 7 thereof.

The Respondents aver that by reason of the said accident and the untimely death, the deceased lost the normal expectation of a happy, productive life together with the prospects of improved earnings in future and thus, the estate suffered loss and damage.

The Appellant filed a statement of defence on the 13th day of March 2014 in which, the Respondents' claim is denied. In particular, the Appellant denies that the deceased was their employee and that the alleged accident occurred on the material day. Further and without prejudice, the Appellant avers that, if an accident occurred, but which is denied, the same was fully caused or substantially contributed to, by the deceased's own negligence. The particulars of the deceased's negligence are set out in paragraph 4 of the plaint. The Appellant also denied that the doctrine of *Res Ipsa Loquit*or is applicable.

A reply to defence was filed on the 20th day of March 2014, in which, the Respondents joins issues with the Appellant on its defence, save where the same consists of admissions.

At the hearing, three witnesses testified in support of the Respondents' case. PW1, Morris Wekesa, was an employee of the Appellant. He produced a warning letter that had been written to him by the Appellant. It was his evidence that he was working with him at the Appellant's premises since the year 2001. He stated that he was working at the furnace as a Burry man while the deceased was a charger.

It was his evidence that on 3rd December, 2010, they were on duty with the deceased when at about 3a.m. there was an explosion at the furnace where they were working. The furnace was full and the deceased was placing a chemical known as manganese when the explosion occurred. That, the supervisor James Mwatibo had switched off the furnace to put the manganese and on being switched on by the deceased, it exploded and the metal steel splashed up due to the explosion. It was his evidence that the deceased was at the furnace and he was among those who got injured.

The deceased was rushed to Guru Nanak Hospital where he was given first aid after which he was taken to Kenyatta National Hospital where he died at around 11.00p.m. the following day. He stated that the deceased was earning Kshs.508/- per day but they were not being given pay

slips. According to him, the company was to blame because there was no escape route and they had not been provided with helmets and there were no fire fighting equipments.

On cross-examination, he stated that he was given a warning letter one month before the accident. He said he had no grudge with the company and denied that he was testifying in the case because he was sacked. It was his evidence that the company brought the material to the workers and theirs was to use the materials given to them.

John Mwaluko Kimeu gave evidence as PW2. He is a brother to the deceased. On the 5th December 2010, he was called from his brother's (deceased) place of work and was informed that the deceased had been involved in a fire accident and had been seriously injured and that he was taken to Kenyatta National Hospital. At the said hospital, the records showed that the deceased had been received at the hospital on 4th December, 2010 and he had died. He went to the police and reported the matter. On the 7th December 2010, he identified the body of the deceased which had severe burns and it was difficult to recognize him. They buried the deceased on 11th December,2010. He produced the death certificate, burial permit, identity card for the deceased and a copy of the NSSF Card as exhibits, among other documents.

In cross examination he stated that the deceased was not married.

Rhoda Munyiva Kimeu testified as PW3. She is the mother to the deceased and co-administrator of the estate of the deceased. She learned about the death of his son on 6th December, 2010 when he was informed by Mwaliko Kimeu, PW2. She stated that she is not able to work and depended on his late son who was assisting her. That the deceased also assisted his sister's children. The deceased used to send her Kshs.5,000 every month and on his death she lost that income. She stated that she does not have any other source of income. It was her evidence that she takes care of some orphans.

The Appellant did not call any witnesses to support its case.

After hearing the case, the learned magistrate delivered her judgment on 11th December, 2015 in which, he entered Judgment on liability at 100% against the Appellant, damages for pain and suffering at Kshs.100,000, Loss of expectation of life Kshs.150,000/-, loss of dependency at Kshs.893,952 and special damages at Kshs.8,925/-

That judgment, is the subject of this Appeal as the Appellant felt aggrieved by the same. Looking at the memorandum of appeal, the Appeal is on quantum of damages. The Appellant's bone of contention is the award on loss of dependency and loss of expectation of life. It is submitted that the learned magistrate erred in adopting a multiplier of 18 years. According to the Appellant, the deceased worked as a furnace charger which involved exposure to flames of fire and as such, he was exposed to very high risk of health issues due to the exposure to excessive dangerous fumes from burning of metal objects and therefore, a multiplier of 18 years is not reasonable in the circumstances. In its view, a multiplier of 15 years would be more than adequate. The Appellant cited the case of **Hyder Nthenya Musili & Another Vs. China Wu Yi Limited and Another (2017) eKLR** in which the case of **Beatrice Wangui Thairu Vs. Hon. Ezekiel Barngetuny & Another HCCC No. 1638/1988** was quoted which case sets out the principles applicable to assessment of damages under the fatal accidents Act.

The appellant submitted that the deceased was involved in employment of a hazardous nature and thus his mortality rate was higher due to the many risks that he was surrounded with. It relied on the case of **Comply Industries Limited & Another Vs. Martha Ngima Muthini (suing as the legal representatives of the estate of the late Stephen Mirau Mutumi) 2014 eKLR** where a multiplier of 20 years was applied for a deceased aged 21 years.

On their part, the Respondents submitted that the trial court took into account, all the factors that it ought to consider in assessing damages for loss of dependency as postulated in the case of **Hyder Nthenya Musili & Beatrice Wangui Thairu** cited by the Appellant. The Respondent cited the case of **Mensah Vs. Amaleom Sawmill (1962) GLR 373** cited in the case of **Davies V. Powell Duffryn Associated Collieries Ltd. (1942) 1 ALL ER 657** as regards the practical way in which assessment of damages should be ascertained.

In determining the multiplier, the right approach to consider is the age of the deceased, the balance of earning life, the age of the dependants, the life expected, the length of the dependency, the vicissitudes of life and factor the accelerated payment in a lumpsum. See the case of **Hannah Wangaturi Moche & Another Vs. Nelson Muya (Nairobi HCCC No. 4533 of 1993).**

In the case herein, the deceased was aged 37 years at the time of death. As rightly submitted by the Respondents, the learned magistrate reasoned that the deceased had 21 more years to work before retiring, but due to uncertainties in life, he adopted a multiplier of 18 years and not 21. I find that the learned magistrate was right in applying a multiplier of 18 years.

The other ground of Appeal is that the learned magistrate erred in failing to deduct the sum of Kshs.150,000 awarded under loss of dependency from the total award, and therefore the award made by the learned magistrate amounts to double benefit. In their response the Respondents relied on Section 2(5) of the Law Reform Act and on the case of **Hellen Waruguru Waweru Vs. Kiarie Shoe Stores Limited (2015) eKLR.**

Section 2(5) of the Law Reform Act provides as follows:

> **"That the rights conferred by or for the benefit of the estate of the 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 means therefore 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.**

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.

The court in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja Vs. Kiarie Shoe Stores (supra)** stated that the deduction of the entire amount made under the Law Reform Act was erroneous and it interfered with the final award on damages. In paragraph 20 of its judgment, the Court of Appeal remarked;

> “The court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. In view of the reasoning by the Court of Appeal, I find that the learned magistrate was right in not deducting the award made under loss *of expectation of life from the total award”*

The court notes that the award of Kshs.100,000 for pain and suffering, and Kshs.8,925 for special damages are not in contention.

I find that the judgment by the learned magistrate was well reasoned and this court should not disturb it. The Appeal has no merits and it is hereby dismissed with costs to the Respondents.

Dated, Signed and Delivered at Nairobi this 18th day of October, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

…….. For the Appellant

…… For the Respondents