



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 119 OF 2017

DORICUS RAEL OYATSI (Suing as an

Administrator of the estate of AGGREY KIGAME

MAGOMERE (Deceased).....APPELLANT

V E R S U S

MASENGELI HERBERT.....1ST RESPONDENT

EDWARD GITHAE WANJAU.....2ND RESPONDENT

(Being an appeal from the judgement of the court delivered on 222nd day of February 2017 by Hon. A. M. Obura (Mrs), SPM in Nairobi Chief Magistrate's Milimani Court Civil Suit no. 5543 of 2014)

JUDGEMENT

- 1) On 30th October 2013, motor vehicle registration no. KBQ 474C was hit by a train while it was stationary at Mutindwa level crossing and as a result, the late Aggrey Kigame Magomere, who was a passenger therein was fatally injured.
- 2) Doricus Rael Oyatsi, the appellant herein, in her capacity as the legal representative of estate of Aggrey Mogomere, deceased filed an action for compensation against Masengeli Herbert and Edward Gothae Wanjau the registered owner and driver respectively of the aforesaid motor vehicle before the Chief Magistrate's Court, Milimani Commercial Courts. The 1st and 2nd respondents filed a defence to deny the appellants claim.
- 3) Hon. A. M. Obura, learned Senior Principal Magistrate, heard the suit and in the end, judgment was entered in favour of the appellant and against the respondents. The appellant was awarded a sum of ksh.2,073,552/= representing both general and special damages. The appellant was also given costs and interest.
- 4) The appellant was dissatisfied with the award on loss of dependency and was therefore prompted to file this appeal whereof she put forward the following grounds:
 - i. THAT the learned magistrate failed to take cognizance of all evidence adduced before her.*
 - ii. THAT the learned magistrate's ruling is erroneous and based on wrong principles by using the net earnings of the deceased as opposed to deducting the statutory deductions from the gross earnings in calculating the loss of earnings.*
 - iii. THAT the learned magistrate misdirected herself, misapprehended and misconstrued the legal principles in the case before her and by reason thereof came to a wrong conclusion.*
- 5) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
- 6) It is the submission of the appellant that the learned trial magistrate applied the wrong principles when he used net earnings of the deceased during the month of August 2013 from the payslip adduced by the respondent. It was pointed out that in that month the deceased was deducted the statutory deductions i.e N.S.S.F N.H.I.F. and PAYE together with other statutory deductions that were for his insurance, pension, savings and advance. The appellant argued that the deceased's net earnings is arrived at by deducting the statutory deductions from the gross salary when computing the loss of earnings.
- 7) The appellant submitted that the only amount to be deducted ought to be the statutory deductions and in this appeal it was proposed that

the learned magistrate ought to have found that net income of the deceased was ksh.66,012 by getting his gross income of ksh.84,800/= less the statutory deductions of kshs.18,788/=. It was proposed by the appellant that the correct calculation ought to have been tabulated as follows:

$$66,012 \times 2/3 \times 12 = 6,337,152/=.$$

8) The respondent was of the submission that the net salary in the deceased's pay slip is what the deceased would have made available for his dependants which in his case was ksh.20,037. The respondent argued that if the calculation is done as proposed by the appellant then it will occasion a situation of double compensation and or enrichment. Consequently the respondent is of the submission that the trial magistrate's analysis of the evidence was proper in light of the evidence presented by the parties.

9) After a careful consideration of the rival submissions and upon re-evaluation of the case before the trial court, I am persuaded by the appellant's submissions. A careful perusal of the deceased's pay slip will reveal that the tax applicable was ksh.18,788/=. That is the amount that should be deducted from the appellant's gross salary of ksh.84,800/= leaving a net salary of ksh.66,012.

10) In the end, I find the appeal meritorious and it is allowed.

Consequently the order assessing damages for loss of dependency at ksh2,073,552/= is set aside and is substituted with an award of ksh.6,337,152/= tabulated as follows:

$$66,012 \times 2/3 \times 12 = \text{ksh.}6,337,152/=.$$

11) Therefore the trial court's award should be adjusted as proposed hereinabove. Costs of this appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents