



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KAKAMEGA.
CIVIL APPEAL NO. 54 OF 2015.

KENYA POWER & LIGHTING CO. ::::::::::::::: APPELLANTS.

VERSUS

ANDREW CHILISWA KWAYELA ::::::::::::::: RESPONDENT.

JUDGMENT

INTRODUCTION.

1. The appeal herein arises from the judgment of Hon. Shitubi, Chief Magistrate in Kakamega C.M.C.C. No. 160 of 2011. The respondent herein had sued the appellant for damages arising from a motor vehicle accident wherein his son CHARLES WAKHOVE CHILISWA lost his life. Liability was agreed upon by consent and the only issue which the trial court determined was quantum Judgment was therefore entered as follows:-

| | |
|------------------------|------------------------|
| a. General Damages | Ksh. 1,480,000/= |
| Less award for loss of | |
| Expectation of life | <u>Ksh. 100,000/=.</u> |
| | Ksh. 1,380,000/=. |
| Less 15% contribution | <u>Ksh. 20,700/=.</u> |
| | Ksh. 1,173,000/= |
| | ===== |
| b. Special Damages | Ksh. 16,575/= |
| Less 15% contribution | <u>Ksh. 2,486.25.</u> |
| Total | Ksh. 14,088.75 |
| | ===== |

c. Costs of this suit plus interest at court rates from the date of judgment.

The appeal.

2. The appellant was aggrieved by the above judgment and filed the appeal herein on the following grounds:-

(a) That the honourable magistrate erred in law and fact by awarding a colossal sum for general damages;

(b) That the honourable magistrate erred in law and fact by failing to consider the appellant's submission on the issue of general damages;

(c) That the honourable magistrate erred in law and fact by misapprehending the facts and applying wrong principles and arriving at wrong decisions;

(d) That the honourable magistrate erred in law and fact in finding that the two thirds benefit rule was applicable on loss of dependency;

(e) That the honourable magistrate erred in law and fact by failing to take into account that there was no evidence that the deceased experienced pain from the moment of the accident to the moment of death and proceeded to award on pain and suffering.

3. The appellant wants the appeal allowed and the judgment of the lower court set aside together with costs.

Submissions.

4. The appeal herein was canvassed by way of written submission which have been filed and exchanged between the parties. Briefly we will look at the said rival submission.

5. The appellant submitted on grounds 1 and 2 together. It was submitted that the award for general damages was huge and exorbitant and should therefore be reduced. The appellant also claimed that the trial court didn't take into consideration the appellant's submissions and had she done so she would not have come up with such a decision. The appellant further submitted that dependency in fatal injuries claim is not rigidly fixed at two-thirds of the net income of the deceased. On this they relied on the decision in **JANE CHELAGAT BOR VS. ANDREW OTIENO ONDUCH & OTHERS [1990]** and that of **ALI VS. NYAMBU t/a SISERA STORES [1990] KLR 534 at page 538** which quoted with approval the principles laid down by the privy council in **Nance vs. British Columbia Electric Railways Co. Ltd [1951] AC 601 at page 613**.

6. He wants the dependency re-assessed to a dependency ratio of 1/3. The appellant has also raised issue on the award on pain and suffering claiming that there was no proof that the deceased incurred any suffering because he died instantly.

7. On his part the respondent maintains that the sum awarded was not colossal and is justified and that the appellant's submissions were duly considered by the trial court. It is further submitted that upon the trial court making a finding that the 2/3 rule was best suited for this case that it proceeded to quantify general damages. They maintain that the trial court applied the principle of law correctly and this court ought not to disturb the award.

8. On the award on pain and suffering the respondent has cited the case of **ALICE O. ALUKWE VS. AKAMBA PUBLIC ROAD SERVICES LTD & 3 OTHERS [2013] eKLR** where the deceased died instantly and was awarded Ksh. 50,000/= on this head.

Determination.

9. The main issue for determination in this appeal is on quantum on damages. Being the first appeal this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see **Selle vs. Associated Motor Boat Co.**

[1968] E.A 123.

10. In **Kiruga vs. Kiruga & Another** [1988] KLR 348 the Court of Appeal observed that:-

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

11. From the proceeding, it is not in dispute that the accident occurred on the 21st June, 2008 and that it involved the appellant's motor vehicle registration No. KZX 249 and the deceased CHARLES WAKHOVE CHILISWA. The issue of liability was agreed upon between the parties at 85:15 in favour of the respondent. We will therefore not dwell so much on the evidence on record which this court has taken time to re-evaluate and analyse.

12. The issue we will deal with is that of quantum of damages which is one of discretion of the trial court that hears the case. In awarding general damages the trial court based her findings on the submissions filed by the parties. The trial court found that there was consensus between the parties on the following:-

(a) The deceased's age which was agreed at 30 years;

(b) His earnings of at least Ksh. 6,825 per month;

(c) That death was on the spot ;

(d) The deceased was survived by his father and a daughter Rhoda Makhungu;

(e) Special damages Ksh. 16,575/=.

13. Based on that, the trial court awarded damages as herein above stated. The trial court also gave this reason as to why they used the 2/3 multiple rule. She explained thus:-

“The age of the deceased's daughter is not given but at 30 years we assume that his offspring was a child and must probably still be in primary school. It would be absurd to limit maintenance that the deceased could have been providing for this child to a small conventional figure of Ksh. 400/= shared with his grandfather. I believe that the two third benefit rule best suits such situation.”

14. The trial court in coming to the conclusion took into account the factors which ought to have been taken account of. Parties had already agreed on these factors. The 2/3 principle as properly stated by the trial court was the best principle the court could use for this case. The trial court did not apply a wrong principle. The principle has been used in various cases for reasons those courts have deemed fit. I therefore find no good reason to re-assess the same to a dependency ration of 1/3.

15. On pain and suffering, I find that the trial court considered the authorities cited and noted that the same had been decided sometime back. She also considered the issue of inflation and came up with Ksh. 15,000/= on this head. This to me is quite reasonable and the trial court therefore did not misdirect herself by awarding the same.

16. All in all the trial court exercised its discretion judiciously. She did not award a colossal amount for general damages as the appellant wants this court to believe. She considered the material the parties agreed upon to make her finding and also relied on their submissions and case law they cited. She didn't use any wrong principles nor did she rely on other factors which she ought not to have relied on. The

amount cannot be said to be inordinately high as to be a wholly erroneous estimate of the damages.

17. The upshot of all the above is that this court will not interfere with the quantum of damages issued to the respondent. The appeal therefore cannot see the light of day. The same is dismissed with costs to the respondents.

SIGNED, DATED AND DELIVERED at **KAKAMEGA** this **5TH** day of **OCTOBER**, 2016.

C. KARIUKI

JUDGE.

In the presence of :-

.....**for the Appellants.**

..... **for the Respondent.**

..... **Court Assistant.**