



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 1 OF 2015
(FORMERLY KISII HCCA NO. 10 OF 2013)

BETWEEN

ALLIANCE ONE TOBACCO (K) LTD APPELLANT

AND

**ISACK JANDI MBANE suing as the administrators of the
estate of LINET AREYO JANDI (Deceased) RESPONDENT**

AND

(Being an appeal from the Judgment and Decree of Hon. D. K. Kemei, SPM in Senior Principal Magistrates Court at Migori in Civil Case No. 52 of 2011 dated 26th November 2013)

JUDGMENT

1. On 16th September 2010, the deceased was walking along the Kisii – Migori road when at about midday, the appellant’s driver hit her resulting in her death. The respondent, as personal representative and administrator of the estate of the deceased, filed suit against the appellant seeking compensation as a result of a road traffic accident. The respondent filed a defence denying liability and instead blamed the deceased for walking on the highway. Ultimately, the issue of liability was settled by consent of the parties with the respondent bearing 20% and the appellant 80%.
2. The issue in this appeal is about the quantum of damages. The court below made the following award; Kshs. 100,000/- for pain and suffering and Kshs. 120,000/- for loss of expectation of life under the **Law Reform Act**. The court also awarded the respondent Kshs. 1,920,000/- for loss of dependency under the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. The learned magistrate deducted therefrom the sum due under the **Law Reform Act** on account of the principle of duplication and subjected the final amount to the agreed contribution.
3. During the hearing Ms Wafula, learned counsel for the appellant, condensed the grounds of appeal set out in the memorandum of appeal dated 30th January 2013 into two grounds. She argued the multiplier adopted was too high as it did not take into account imponderables and vagaries of life. She submitted that the multiplicand of Kshs. 8,000/- was not based any evidence or proof that the deceased was working and that the minimum wage should have been used to calculate the multiplicand. She contended that the respondent did not prove dependency as he did not prove that he was married to the deceased or that they had children. As a result she urged that the damages

awarded were excessive so as to amount to an entirely erroneous estimate of damages in favour of the respondent.

4. Counsel for the respondent, Mr Marwa, supported the judgment on the ground that it was based on the evidence and that the learned magistrate's conclusions were supported by the authorities cited by the parties. He submitted that the respondent's evidence was not challenged hence the learned magistrate arrived at a proper assessment taking into account the law.
5. The duty of the first appellate court is to review the evidence and reach an independent conclusion as to whether to uphold the decision of the subordinate court bearing in mind that it neither heard or saw the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123***). Additionally, as this is an appeal on the quantum of damages, the general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no 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***).
6. The plaintiff gave the following particulars pursuant to **section 7** of the ***Fatal Accidents Act*** in the plaint;

The deceased was 27 years old at the time of her death. She was working as a support staff at NGO Oyani Christian Center with a salary of Kshs. 10,000/- per month. Her four children together with the plaintiff were dependent on her, by her death her estate and dependants have suffered loss. The particulars of the dependants were as follows; Isaac Areyo Jandi – husband, Girison Odeme – son 13 years, Hesbon Karani – son 10 years, Ezron Kisia – son 6 years, Purity Loma – Daughter.

7. During the hearing, the respondent testified and reiterated the contents of the plaint I have outlined above. He produced a letter dated 24th February 2010 from Oyani Christian Centre appointing the deceased to the position of subordinate staff with a starting salary of Kshs. 8,000/-. He also produced a birth certificate for one of the children, Hesbon Karani, who was born on 10th August 2001. The appellant did not call any evidence to rebut the plaintiff's testimony.
8. Based on the evidence, the learned magistrate made the award that is now challenged. The manner of assessment of damages under the **Act** was **succinctly put by Ringera J., in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)*** where he stated 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.

9. In the submissions before the trial magistrate, the appellant contended that there was no proof of income hence a sum of Kshs. 3000 would be reasonable as a multiplicand. The appellant suggested a multiplier of 20 years. It proposed a dependency ratio of 2/3. The respondent urged the court to use a multiplicand of Kshs. 10,000/-, a multiplier of 35 years and dependency ratio of

2/3.

10. The respondent was required to prove his case on the balance of probabilities. The appellant, having received due notice of the plaintiff's claim, had the opportunity to investigate the particulars and bring evidence in rebuttal. Having failed to do so, I find that the plaintiff's evidence uncontested. The fact that she was earning is proved by the letter from her employer which shows she had been appointed to a position where she was earning Kshs. 8000/- per month. The amount used in calculating the multiplicand is the net earnings and not gross earnings. The learned magistrate did not take this into account. I would accordingly reduce the amount by Kshs. 1000/- and adopt Kshs. 7,000/- as the multiplicand.
11. As regards the multiplier, the learned magistrate discounted the normal working life expressed by the retirement age of 60 years by three years. I do not think three years deducted off the retirement age reflects the life expectancy, normal vagaries of life which the deceased would be subjected to. I would find that a term of 25 years as a multiplier would be most appropriate.
12. Both parties submitted that a dependency ratio of 2/3 was appropriate. The learned magistrate accepted the submission of both parties. Consequently, I cannot interfere with that aspect of the award.
13. As a result I would set aside the award on damages under the *Fatal Accident Act* and substitute it with an award of Kshs. 1,400,000.00 (**Kshs. 7,000/- X 12 X 2/3 X 25 = Kshs. 1,400,000.00**). The said sum shall be subjected to the agreed contribution.
14. Finally, when the court makes an award under the *Fatal Accidents Act* it must, in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant of the deceased. I direct the respondent to file the necessary application for consideration before the subordinate court in due course.
15. There shall be no order as to costs.

DATED and DELIVERED at MIGORI this 8th day May of 2015.

D.S. MAJANJA

JUDGE

Ms Wafula instructed by S. O. Madialo & Company Advocates for the appellant.

Mr Marwa instructed by Kerario Marwa & Company Advocates for the respondent.