



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO. 175 OF 2010

BETWEEN

AJIWA SHAMJI COMPANY LTD APPELLANT

AND

REHEMA ATIENO OKOTH *suing as personal & legal representative of*

PAUL O. OJWANG RESPONDENT

(Being appeal from the judgment and decree of Hon. V.W. WANDERA Esg. SPM dated 30th June 2010 in the original Kisii CMCC No.658 of 2006)

JUDGMENT

1. By an amended plaint amended on 13th July 2007 the respondent sued the appellant in respect of a road traffic accident on 6/1/2006 involving Paul Okoth Ojwang herein referred to as the deceased while travelling as a passenger in motor vehicle registration number KAQ 543Z and motor vehicle registration number KAU 336A owned by the appellant.

2. It was pleaded that the accident and subsequent fatal injuries were caused by the negligence of the drivers of motor vehicle registration number KAU 543Z as a result of which the estate of the deceased suffered loss and damage particulars of which were pleaded as:-

- | | |
|------------------------|--------|
| (a) Police abstract | 100 |
| (b) Death Certificate | 50 |
| (c) Funeral Expenses | 20,000 |
| (d) Cost of succession | 8,000 |

3. The respondent sought for judgment against the appellant and the second defendant for:-

- (a) Special damage
- (b) General damages under Fatal Amendments Act
- (c) General damages under the Law Reform Act

4. By a defence dated 30/8/2006 the appellant admitted the occurrence of the accident but pleaded that the accident was solely caused by the negligence of the driver of motor vehicle registration KAQ 543Z.

5. By Chamber Summons dated 29th May 2007 the appellant dated 29th May 2007 the appellant sought an order to join ALEXANDER GRAHAM OTIENO the owner and driver of motor vehicle registration number KAQ 543Z to the said proceedings which applications was allowed by consent.

6. By a defence dated 10/8/2000 the 2nd defendant denied the occurrence of the said accident and on a without prejudice basis he pleaded that the same was wholly and or substantially contributed to by the appellant driver.

7. Based upon the said pleadings the matter proceeded for hearing on quantum upon judgment on liability being entered by consent on the basis of 60%:40% against the appellant and the 2nd defendant respectively and the trial magistrate entered judgment on quantum as follows:-

(a) Under Fatal Accident Act

(i) Loss of dependency 1,115,980.00

(ii) Special damages 23,150.00

(b) Under Law Reform Act

(i) Loss of expectation of life 100,000.00

(ii) Pain and suffering 10,000.00

(C) loss of consortium 50,000.00

1,299,130.00

Less loss of expectation of life 100,000.00

1,199,130.00

8. Being aggrieved by the said judgment on quantum the appellant filed this appeal and raised the following grounds of appeal:-

1. The Learned Trial Magistrate grossly erred in both law and in fact when he held that the respondent had proved dependency on the deceased and when he failed to appreciate the submission and binding authorities cited by the appellant at the trial below and proceeded to assess loss of dependency at Kshs.1,115,980/= under the Fatal Accident Act without proof at all instead of dismissing the claim for such loss of dependency.

2. The learned Trial Magistrate erred in both law and in fact when he failed to appreciate that a party is bound by his pleadings and the full import of Order VI Rule 6 of the Civil Procedure Rules.

3. The learned Trial Magistrate erred in law and in fact when he failed to take into account the damages under the Law Reform Act, while awarding damages under the Fatal Accidents Act and in failing to appreciate the fact that in failing to do so, by discounting the same, the estate of the deceased and the alleged dependants were bound to benefit twice, which is irregular and that in so doing, he went against the doctrine of precedent.

4. In assessing the said damages under the fatal accidents act, the learned judge took into

account an irrelevant factors and failed to take into account relevant ones and in doing so, he awarded damages which were inordinately high and excessive in the circumstances thereby committing an error of principle.

9. Directions were given that the appeal be determined by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the respondent never pleaded the income the deceased earned per month or the amount the deceased spent out of his income to sustain his family.

10. It was submitted that in her evidence the respondent stated that the deceased gave her Kshs.5000/= per month for the family needs and that therefore the trial court erred when he adopted a multiplicand of Kshs.8718.60 as the balance of the deceased net salary after statutory deduction since the net salary reflected was Kshs.2242/= which was the proved net income and it was the one the Honourable court should use as a multiplicand.

11. It was further submitted that the multiplier of 16 years was erroneous and should therefore be reduced to 12 years. In support of the submission the following cases were submitted. BEATRICE KIVUVO & ANOTHER V SAMSON KITONGA Machakos HCCC No. 61 of 1998 where a multiplier of 12 years was adopted in respect of a 31 years old with a net salary of Kshs.4700/= as a multiplicand.

12. It was submitted further that the trial court did not deduct full amount awarded under the Law reform Act from the loss dependency.

13. On behalf of the respondent it was submitted that the same had proved her case and that the assessment by the trial court on loss of dependency was based on facts presented to court. It further submitted that the trial court discounted Kshs.100,000/- being the loss of expectation of life under Law Reform Act.

14. Since judgment on liability was entered by consent the only issue for determination in the appeal is as regards an award of damages and to that effect the following issues have been identified from determination.

(a) whether the respondent had proved dependency and if so what amount should have been awarded under the heading of loss of dependency.

(b) whether the trial court look into account the damages under Law Reform Act while awarding damages under the Fatal Accident Act.

15. From the judgment herein it is clear that the trial court deducted a sum of Kshs.100,000/= awarded under the Law Reform Act and therefore the same cannot be faulted herein.

16. On the issue of loss of dependency the respondent Rehema Atieno Okoth testified that she was married to the deceased and were blessed with two children. She further testified that the deceased was aged 31 years old at the time of his death and was a primary teacher at Ondiwa Gamba primary school and before filing suit she had obtained a Limited Grant of Letter of Administration. Her evidence was supported by pw2 the deceased father.

17. It was the respondent evidence that the deceased used to give her Kshs.5,000/= per month in addition to assisting his father pw2. Based upon the evidence on record the trial court was therefore right in his finding that the respondent was a dependent of the deceased and was therefore entered to an award of damages under the Fatal Accident Act.

18. From the proceedings before the trial court it is the appellant who proposed a multiplicand of Kshs.8718.60 with a multiplier of 15 years which was adopted by court and therefore they cannot now fault the trial court for using Kshs.8718.60 noting that their proposed sum of Kshs.2242/= was not to subjected to cross examination by the respondent.

19. It is further not disputed that the deceased was at the time of his death aged 31 years old. The trial court noted that the same would have retired at the age of 55 years and having found as a fact that a multiplier of 16 years was reasonable I find no fault with the said finding.

20. In the final analysis I find no merit on the appeal herein which I hereby dismiss with no order as to cost.

Delivered, signed and dated at Kisii this 16th day of June 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Odhimbo advocate for the appellant.

Mr. OM Otieno for Bunde for Respondent.