



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & ODEK, J.J.A.)

CIVIL APPEAL NO. 340 OF 2014

BETWEEN

ELIZABETH NJERI NDERI

SARAH WANGITHI MWANGI (*Suing as the legal representatives*

of PETER NDERI KINYUA (Deceased).....**APPELLANTS**

AND

HIGHWAY CARRIERS LIMITED.....**RESPONDENT**

(Being an application for extension of time to serve notice and record of appeal out of

time arising from the Ruling and Orders of the High Court of Kenya

at Nairobi (D. A. Onyancha, J.) dated 24th September, 2014

in

H.C. C. A. No. 11 of 2010)

JUDGMENT OF THE COURT

[1] The appeal is against the judgment of the High Court in exercise of its appellate jurisdiction dismissing the appellants' appeal against the Ruling of Senior Principal Magistrate. The Senior Principal Magistrate by a brief one – page ruling dismissed the appellants' claim against the respondent for compensation under the Workmen's Compensation Act (W. C. Act) – now appealed and re-enacted.

[2] By an application dated 10th September 2007, which was in the prescribed form, the appellants claimed compensation in respect of the death of *Peter Nderi Kinyua*, a truck driver employed by the respondent who died in a road traffic accident in Mazaras Mombasa, on 22nd September, 2004 aged about 55 years. The application indicated that *Elizabeth Njeri Nderi*, the 1st appellant, was the widow of the deceased and *Sarah Wangithi Mwangi*, the 2nd appellant was a sister of the deceased. The application also indicated that it was made by the two appellants as personal representatives of the deceased on behalf of the deceased's dependants. In addition, the application named ten dependants of the deceased who included the two appellants, three sons and five daughters of the deceased. The ages of the dependants were also shown. The deceased's sons and one daughter were shown to be above 18 years of age while four daughters were shown to be below the age of 18 years. The ages of the last two daughters was indicated as 8 and 4 years respectively. The application indicated that all the dependants resided in Sagana which is in Kirinyaga County.

[3] The firm of Kibuchi & Co. Advocates filed a preliminary objection on behalf of the respondent questioning the jurisdiction of the court. The preliminary objection was subsequently withdrawn. The respondent's advocates also filed a statement containing grounds of opposition

thus:

- “1. The accident which caused the death of the deceased was caused as a result of deceased’s negligence.**
- 2. The said accident did not occur in the course of his employment.**
- 3. The persons named in paragraph IX were not dependants of the deceased.**
- 4. The deceased was not a workman to whom the Act applied.”**

[4] On the hearing date of the application, the respective counsel for the parties agreed that the application be heard by way of affidavits. The court recorded a consent order to that effect, adjourned the hearing and gave leave to the parties to file affidavits. The 1st appellant filed a supplementary affidavit and a further supplementary affidavit to which she annexed several documents including the report of the accident by the respondent, post mortem report, police abstract, petition for grant of letters of administration in respect of the estate of the deceased and the Limited Grant issued to the appellants on 3rd October, 2007 in High Court, Probate and Administration Cause No. 2189 of 2007. The respondent filed a replying affidavit sworn by **Regina Kithaka**, Legal Manager of Kenindia Assurance Company.

Oral submissions were made at the resumed hearing but the court postponed the ruling to give the parties a chance to reach an amicable settlement of the claim. When the settlement failed, the court delivered the ruling dated 30th April 2009. The trial court stated in the relevant part:

“The documents have been submitted to prove that the listed dependants are indeed dependants of the deceased here. (sic) The applicants have therefore failed to show that the deceased left any dependants for purpose of section 6 of Cap 236. Consequently, the application fails and is dismissed with no orders as to costs.”

[5] The appellants appealed to the High Court on the main ground that the trial court erred in law and in fact in not finding that dependency was proved by affidavits and documents including the Limited Grant of Letters of Administration. The issue of dependency was the only issue raised in the appeal. Indeed, the respondent’s counsel in his written submissions dated 19th November, 2012 submitted that the main bone of contention was whether the persons listed in the application for compensation were true dependants of the deceased. The High Court (**D.A. Onyancha, J**) considered the appeal and said in the relevant part:

“...In the court’s view, the lower court rightly found that the petition for the grant of the letters of Administration was no proof of matters it alleged. Nor did the Grant of Letters of Administration ad litem prove that the contents of the Petition were true. It was necessary for the Petitioner(s) to prosecute the petition during which proceedings she/they would produce evidence to prove that the Petitioners were either wife and/or children of the deceased. They would need to produce evidence such as birth or marriage certificates. This was not done, leaving the facts deponed in the affidavits to be mere allegations.”

[6] The appeal is against that finding. At the hearing of the appeal, there was no appearance by the advocates for the respondent although duly served with a hearing notice in good time. **Mr. Le Parmarai**, counsel for the appellants prosecuted the appeal and submitted, in essence, that, the High Court erred in law in finding that proof of dependency should be by birth certificate or marriage certificate and that there is no requirement even under the Law of Succession Act that certificate of birth or marriage should be produced to prove dependency.

[7] The word “dependants” was defined in **section 3** of the repealed Act as meaning (in part):

“... those members of the family of a workman who were wholly or in part dependent upon his earnings at the time of his death, or would but for the incapacity due to the accident have been so dependent...”

As section **20(2)** of the **W.C. Act** provided, in proceeding for compensation in respect of death of a workman, if the court is satisfied that other evidence or sufficient evidence of dependency or degree of dependency cannot be procured without undue hardship to the claimant who resides outside the District where proceedings are being held, the court can rely on a statement signed by the District Commissioner and such statement by him is *prima facie* proof of facts in that statement and is to be admitted without proof unless the court has reasons to doubt its genuineness. In the present case, the claim was being heard in Nairobi and the claimants lived in Sagana in the then Kirinyaga District. The provisions of **section 20(2)** of the **W.C. Act** shows that the court could rely on informal evidence as *prima facie* proof of dependency or degree of dependency.

[8] Moreover, the **W.C. Act** was repealed by **Section 57** of the **Work Injury Benefits Act – Act No. 13 of 2007** which commenced on 2nd June 2008, (**2007 Act**) pursuant to LN Notice No. 60 of 23rd May, 2018. Section 6 of the 2007 Act defines a **“dependant”**. According to the definition, widow or widower, child below age of 18, parent, brother, sister, half-brother, half-sister of the deceased are dependants without requirement that they were wholly or in part dependent on the deceased employee. It is only persons outside the stipulated relation with the deceased employee who are required to show that they were wholly dependent on the deceased employee.

Section 34 of the 2007 Act stipulates the manner of determining the amount of compensation in case of death and S. 34(3) thereof provides:

“For the purposes of this section, a dependant is deemed to have been wholly financially dependent upon the employee at the time of the accident, unless the contrary is proved.”

Section 58(2) of the 2007 Act provides:

“Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.”

[9] The repealed W.C. Act gave jurisdiction to a subordinate court to determine applications for compensation whatever may be the amount involved (section 17). It appears from the provision of the 2007 Act that the jurisdiction to determine applications for compensation is now conferred upon the Director of Work Injury Benefits established by section 53 of that Act. By section 51 thereof, a person aggrieved by the decision of the Director has a right to file an objection to the Director and by section 52(2), there is a right of appeal to the Industrial Court from the decision of the Director on the objection.

The Industrial Court was replaced by the **Employment and Labour Relations Court (E&LRC)** which was established by the Employment and Labour Relations Court Act – No. 20 of 2011 which by section 12(1) gives that court exclusive original jurisdiction to hear and determine disputes relating to employment and labour relations. Section 12(5)(b) specifically gives E&LRC power to hear and determine appeals from the decision of any other local tribunal or commission as may be prescribed under any written law.

[10] Reverting to the instant appeal, the appellants named the dependants of the deceased and their relationship with the deceased. As already stated, the named dependants are his widow, children and a sister. The parties agreed that the application be determined by affidavit evidence. The documents annexed to the 1st appellant’s affidavit included a petition for Grant of Letters of Administration to the estate of the deceased which was already filed, a Limited Grant of Letters of Administration issued to the appellant for purpose of filing suit and a letter dated 20th March 2006 from the Chief, Mutithi Location, Kirinyaga District addressed to the Principal Magistrate Nairobi verifying that the 1st appellant was the only widow of the deceased and the one entitled to inherit his properties. Whereas those documents did not prove dependency, they showed that the claim by the 1st appellant that she was a widow of the deceased and that she and the children of the deceased were dependants was genuine. The respondent did not provide any evidence to the contrary. The High Court failed to appreciate that the W. C. Act imposes strict statutory duty to the employer of an employee who has died at work or has been injured to pay compensation to the dependants of a deceased worker.

[11] In addition, the High Court failed to appreciate the transitional provisions in Section 58(2) of the 2007 Act which expressly provide that previous claims under the repealed W.C. Act were deemed to have been lodged under the new Act. By section 23(3) of the **Interpretation and General Provisions Act**, the repealed law applies where the repealing Act does not show a contrary intention. In our view, section 58(2) shows a contrary intention. Both the decision of the subordinate court and the High Court was made after the 2007 Act had come into operation and the two courts below erred in law in failing to find that the appellants and the children of the deceased were dependants within the meaning of section 6 of the 2007 Act.

[12] We are aware that the constitutionality of various provisions of the Work Injury Benefits Act has been challenged in the High Court. In **Attorney General v. Law Society of Kenya & another [2017] eKLR** (Law Society’s decision), this Court reversed the decision of the High Court which had declared several provisions of the 2007 Act to be inconsistent with the repealed Constitution and declared only section 7 and 10(4) of the 2007 Act to be inconsistent with the former and current Constitution. Sections of the 2007 Act referred to in this judgment particularly sections 6, 34(3), s. 51, 52, 53 and 58(2) were left intact by the Law Society’s decision.

[13] In the premises, the appeal is for allowing. However, the amount of compensation was not determined by the trial court or by the High Court. The case has gone through the courts and if the High Court had jurisdiction, we would remit the case to the High Court to determine the amount of compensation. Now that the appellate court is the Employment and Labour Relations Court, the case should be remitted to that court.

[14] Accordingly;

(a) The appeal is allowed with costs to the appellants against the respondent.

(b) The judgment of the High Court is set aside.

(c) In substitution thereof:

(i) the appellants’ application dated 10th September 2007 for compensation under the repealed Workman’s Compensation Act is allowed;

(ii) the amount of compensation to be computed under the Work Injury Benefits Act.

(d) The case is remitted to the Employment and Labour Relations Court to deal with the matter in accordance with the Work Injury Benefits Act.

Dated and Delivered at Nairobi this 6th day of August, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR