



Sukari Industries Ltd v Akina (Suing on her own behalf and on behalf of the Estate of Felix Omondi Akina (Deceased) (Appeal E055 of 2023) [2024] KEELRC 12 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 12 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E055 OF 2023
S RADIDO, J
JANUARY 24, 2024

BETWEEN

SUKARI INDUSTRIES LTD APPELLANT

AND

ROSELINE ADHIAMBO AKINA (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF FELIX OMONDI AKINA (DECEASED) RESPONDENT

(Being an Appeal from the judgment and decree of the Subordinate Court (Hon J.M. Munguti (SPM) dated and delivered on the 24th February 2021 in Migori CMCC No. 174 of 2019 filed pursuant to leave of the Court Hon Justice Radido Stephen granted on the 16th October 2023 in Kisumu ELRC Misc Application No. E079 of 2023)

JUDGMENT

1. On 24 February 2021, the Senior Principal Magistrate found Sukari Industries Ltd (the Appellant) 100% liable for the accident and injuries to one Felix Omondi Akina (deceased) and awarded Roseline Adhiambo Akina as the legal representative (the Respondent) general damages of Kshs 3,743,296/-.
2. The Appellant was dissatisfied and it lodged an Appeal with the High Court. The High Court declined the Appeal on jurisdictional grounds and the Appellant secured leave of this Court to file a fresh appeal.
3. The Appellant filed the Memorandum of Appeal before this Court on 16 October 2023.
4. In the Memorandum of Appeal, the Appellant contended that:
 - i. The Learned Trial Magistrate erred in law and in fact in finding and holding without evidence and without any other legal justification that the Appellant was wholly liable in negligence for the accident in issue wherein Felix Omondi Akina (deceased) sustained fatal injuries and



in failing to apportion liability against the deceased who at the time was having the exclusive physical control of the tractor and with which he, the deceased had a self-involving accident.

- ii. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant, a limited liability company that at the time of the accident did not have control of the tractor and which was in the exclusive physical control of the deceased was liable for the occurrence of the accident in which the deceased suffered fatal injuries.
 - iii. The Learned Trial Magistrate erred in law in proceeding with the suit as before him and entering judgment for the Respondent as against the Appellant without jurisdiction to do so and when without jurisdiction to hear and determine the suit before him, he found the Appellant 100% liable for the accident in issue and that the Respondent had proved dependency to the deceased and therefore had lost the same against the Appellant.
 - iv. The Learned Trial Magistrate failed to find and to hold that the suit before him was non-existent and had been sustained for a non-existent person, and a person who because of amendments was not a party to the suit.
 - v. The Learned Trial Magistrate erred in law and fact in failing to find and hold in spite of the contradictory and insufficient evidence led before him, that the Respondent did not prove her case before the Subordinate Court and specifically that the Appellant was wholly liable in negligence for the work-related accident wherein Felix Omondi Akina (deceased) died.
 - vi. The Learned Trial Magistrate erred in law and fact when, after he opted for and applied the multiplier approach to the assessment of damages, he chose and applied a multiplier of twenty-eight (28) years, when the multiplier was excessive, did not take vicissitudes of life into account and was out of sync with binding, contemporary precedent, and was unreasonable.
 - vii. The Learned Trial Magistrate erred in law and in fact, after he opted and applied the multiplier approach to the assessment of damages, he chose and applied a multiplicand of Kshs 15,729/- whereas that amount was never proven by the evidence which was led before him.
 - viii. The Learned Trial Magistrate erred in law and in fact in applying wrong principles and ignoring the proper principles in assessing damages, hence awarded the Respondent the sum of Kshs 3,523,296/- as general damages for loss of dependency under the *Fatal Accidents Act*, which award of damages was inordinately and manifestly excessive given the circumstances.
 - ix. The Learned Trial Magistrate erred in law in disregarding the Appellant's submissions on the award sought under the *Fatal Accidents Act* and thus arrived at a wholly erroneous award.
 - x. The Learned Trial Magistrate erred in law and fact in deciding the case, on the whole, against the evidence that was before him, thus arrived at a decision which was wholly erroneous.
5. The Appellant filed the Record of Appeal on 19 October 2023, and the Court gave directions on 24 October 2023 and 5 December 2023.
 6. The Appellant filed its submissions on 23 November 2023 and the Respondent's submissions were filed on 1 December 2023, but in the wrong (Misc Application No. E079 of 2023, Sukari Industries Ltd v Roseline Adhiambo Akina).
 7. The Court has considered the Record and submissions.

Role of the Court in First Appeal

8. The role of a first appellate Court has been the subject of discussions in numerous Court decisions.



9. In *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

10. This Court will keep the interdict in mind.

Jurisdiction

11. The Appellant contended that because the deceased was its employee and was involved in an accident in the course of work, then by virtue of the *Work Injury Benefits Act*, first instance jurisdiction lay with the Director of Occupational Safety and Health. The Appellant drew the attention of the Court to *Law Society of Kenya v Attorney General & another* (2019) eKLR and the *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR.
12. The Court has looked at the Amended Statement of Defence which the Appellant filed before the trial Court and established that the question of jurisdiction was not pleaded. In fact, the Appellant admitted that the Court had jurisdiction.
13. Similarly, the Appellant did not make any submissions with regard to the jurisdiction of the trial Court in its written submissions before that Court.
14. The Court also notes that the Appellant informed the High Court (on appeal) that it wished to abandon the challenge to the jurisdiction of the trial Court.
15. The Court further notes that the Cause was lodged with the Magistrates Court in 2019 when the obtaining legal framework was guided by the judgment of the High Court declaring the relevant provisions of the *Work Injury Benefits Act* inconsistent with the *Constitution*.
16. This Court, therefore, cannot fault the Senior Principal Magistrate for not raising the question of jurisdiction suo moto when none of the parties deemed it an issue for determination.

Liability

17. The Senior Principal Magistrate found the Appellant 100% liable for the accident that led to the deceased (demise) and the Court reasoned:

From the evidence of PW 1 it is clear the Defendant was to blame in that the immediate cause of the accident was triggered by the tire which came off and flew away. The question is, can this be blamed on the driver? The answer is No because it was the responsibility of the Defendant to ensure their machinery is in good working condition before assigning drivers. In the present case, I hold that the Defendant is wholly to blame and I proceed to enter judgment on liability at 100%.

18. Was the conclusion by the Senior Principal Magistrate supported by the evidence? This Court does not think so.



19. The second witness presented before the trial Court testified:

On 12/07/2018 at 5.00 pm I was riding from Ayiego leading to Ragogi. I came across a tractor near Obado's home. The tractor was being driven at a very high speed. It was full of sugarcane. The tractor overturned, and one of the big tyres came off and flew away.
20. The Senior Principal Magistrate gave no consideration to this evidence of high speed from an eye witness and whether it could have been part cause of the accident.
21. The deceased opted to drive at speed a tractor ferrying sugarcane. That was a choice he made and he should have been found to shoulder some responsibility for the accident.
22. No witness was called to testify as to the mechanical soundness of the tractor. However, the tyres of vehicles do not ordinarily fly off. With regular checks, the Appellant ought to or should have established if there were loose or missing bolts, or any other defects in the tyre framework.
23. Considering these factors, the Court is of the view that both the deceased and Appellant should have borne some liability for the accident and fatal injuries.
24. The Court assesses the deceased share of liability at 40%.

Award of general damages

25. The Appellant challenged the use of a multiplicand of Kshs 15,729/-, asserting that it had not been proved the deceased was earning that wage. The Appellant further contended that a multiplier of 28 years was unreasonable.
26. The evidence before the trial Court was that the deceased was earning a daily wage of Kshs 524/-. The Principal Magistrate multiplied the daily wage by 30 days (a month).
27. The Court does not find any error on the part of the Senior Principal Magistrate as to the use of an average monthly wage of Kshs 15,729/-.
28. The deceased died while aged 35 years at the material time. The Principal Magistrate factored in the age expectancy of 62 to 63 years in Kenya and used a multiplier of 28 years, but there was no evidence placed before him on the age of expectancy.
29. However, considering the age of the deceased, the Court will not disturb the finding on the multiplier.

Conclusion and Orders

30. Having considered the record, the Appeal only succeeds to the extent that the findings on liability is set aside and substituted with a finding that the deceased was liable 40% for the accident.
31. The Court thus orders that the award of Kshs 3,743,296/- be discounted by 40%, and awards the Respondent Kshs 2,245,977/-.
32. Each party to bear own costs of the Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF JANUARY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances



For Appellant For Appellant Okongo Wandago & Co. Advocates

For Respondent Edward Kisia & Associates

Court Assistant Chrispo Aura

