



REPUBLIC OF KENYA



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Athi River Mining Limited v Mutiso & another (Both suing for and on behalf of the Estate of Dominic Kioko Mwisu - Deceased and for his Dependants) (Appeal 12 of 2021) [2022] KEELRC 13282 (KLR) (25 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13282 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 12 OF 2021
MA ONYANGO, J
NOVEMBER 25, 2022

BETWEEN

ATHI RIVER MINING LIMITED APPELLANT

AND

MBULWA MWISO MUTISO 1ST RESPONDENT

MARY NZILANI MUTISO 2ND RESPONDENT

BOTH SUING FOR AND ON BEHALF OF THE ESTATE OF DOMINIC KIOKO MWISO - DECEASED AND FOR HIS DEPENDANTS

(Being an appeal arising from the judgment and decree of Senior Principle Magistrate Hon. C. Oluoch, delivered on the 9th day of May 2018 at the ELRC MACHAKOS JUDGMENT APPEAL NO. 12 OF 2021 DRAFT Principal Magistrate's Court at Mavoko Law Courts in Civil Suit No. 956 of 2013)

JUDGMENT

1. The Appellant herein filed an appeal against the judgment and Decree of the Senior Resident Magistrate at Mavoko PMCC No. 956 of 2013 delivered on 9th May, 2018. In the Judgment, the Learned Trial Magistrate found the Appellant 100% liable and awarded the following:
 - i. Liability 100% in favour of the plaintiffs
 - ii. Pain and suffering Kshs.1,000,000
 - iii. Loss of expectation Kshs.100,000
 - iv. Loss of dependency Kshs.716,300



- v. Special damages Kshs.21,060
Total Kshs.1,858,420
2. The Appellant being dissatisfied with the judgment of the Trial Magistrate filed the instant appeal in which it raised the following grounds of appeal:
- i. The Learned Magistrate erred in law and in fact in finding the Appellant 100% liable for causing death of the deceased where no tangible evidence was given to prove the same.
 - ii. The Learned Magistrate erred in law and in fact when she found that the deceased died as a result of occupational illness when no substantive evidence was adduced to prove the same.
 - iii. The learned trial magistrate erred in law and in fact when she relied on the Respondent/ plaintiff evidence against the Appellant/Defendant's evidence without attributing any cogent reasons for so doing.
 - iv. The learned trial magistrate erred in law and in fact when she awarded a sum of Kshs.1,000,000/= as pain and suffering when the same was unreasonably excessive in the circumstances.
 - v. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions thus arriving at the wrong finding.
 - vi. The Learned Trial Magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.
3. The Appellant seeks the following orders:-
- a. That the trial magistrate's judgment on liability and quantum delivered on 9th May 2018 be set aside in its entirety and that this honourable court do make its own finding on both liability and quantum
 - b. That the costs of this appeal and the court below be borne by the respondents
4. The appeal was disposed of by way of written submissions.

Appellant's Submissions

- 5. The Appellant distilled the issues for determination to be whether the Deceased died as a result of an occupational illness and whether the Appellant was liable for his death.
- 6. The Certificate of Death of Dominic Kioko Mwisu (the deceased) which was produced in court by the plaintiff as Exhibit no. 2 indicates that the deceased passed away as a result of tuberculosis. The treatment card from Machakos level 5 Hospital shows that the deceased was ailing from tuberculosis.
- 7. The Appellant submits that the plaintiffs did not adduce evidence on how silicosis mutated to tuberculosis as the cause of the death of the deceased.
- 8. The Appellant submits that the Doctor who testified in court did not carry out his own independent medical diagnosis to ascertain that the deceased actually suffered from silicosis.
- 9. The Appellant submits that the Plaintiffs did not prove that the deceased died of an occupational disease called silicosis and not tuberculosis. They Appellant relied on the holding in the case of Eldoret



Steel Mills v Jane Rodah Adthinga and Another (2012) eKLR in which Ibrahim J. (as he then was) was presented with a work injury claim in which the cause of death was not clear. The court stated that;

“The fact of the matter as PW3 put it was not possible to tell the cause of death. Without proof of cause of death, the plaintiff’s case would fall automatically. There was no case for the defendant to rebut. It was therefore misdirection on the part of the trial magistrate that the evidence of PW3 was not rebutted.”

10. The Appellant submits that the deceased died two years after leaving employment of the Appellant in 2008. That from the history of the doctor (PW1) the deceased was still working somewhere else in 2009 where his employment was terminated due to his deteriorating health.

11. The Appellant submits that one Peter Kwinga (DW1) testified that the deceased was never sick during the period he worked for the Appellant. He testified that the deceased worked at the boiler section where solid flakes of sodium were dissolved in water and the particles were big thus the deceased could not have inhaled them into his lungs. That the deceased was never exposed to silicate in its raw form.

12. The Appellant submits that the deceased never came into contact with silicate dust and that he was issued with protective gear at the workplace. He further testified that at the time the deceased left employment he was in good health and never complained of any illness.

13. The Appellant submits that the Respondent failed to tender any evidence to prove that the deceased died as a result of an occupational disease.

14. The Appellant relied on Sections 107 and 109 of the Evidence Act on the burden of proof. Section 107(1) states that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

15. Section 109 of the same Act states that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on the particular person.

16. The Appellant submits that the Respondents failed to discharge the burden of proof that the Appellant was negligent and therefore liable in any way for the death of the deceased.

17. The Appellant submits that the Learned Magistrate erred by ignoring the cause of death indicated in the death certificate and the treatment history and by relying only on the experts’ (Doctors’) evidence which was inconclusive as there was contradicting evidence produced by the Plaintiff.

18. The Appellant further relied on the case of Apex Security Services Limited v Joel Atuti Nyaruri [2018] eKLR where the Court stated that;

“I fully concur that expert’s evidence should not trump all other evidence, that it should not be considered in a vacuum and the same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the court to evaluate complex matters the said evidence is not compelling on its own.”

19. The Appellant submitted the following on quantum of damages;

a. Whether the Honourable Magistrate erred in awarding Kshs.1,000,000/= for pain and suffering



The Appellant submits that an award of Kshs1,000,000/= was excessive as courts in their exercise of discretion based on the injury sustained and the duration before death occurs have given awards under this head of between Kshs.10,000 and Kshs.100,000.

The Appellant submits that the deceased did not sustain any injury during his employment with the appellant. That he was suffering from an illness and he should therefore not be given compensation for pain and suffering. The appellant however submits that should the court find that he actually ought to be compensated for pain and suffering, a sum of Kshs.20,000 would be sufficient.

- b. For lost years the Appellant submits that Kshs.100,000 would be reasonable.
 - c. For loss of dependency the Appellant submit the deceased did not have a wife and children who depended on him. He was only supporting his mother, therefore, submitting under this head an award of Kshs.572,983.
 - d. On special damages the Appellant submit the respondents should be bound by their pleadings and can only be awarded what they have proved.
20. The Appellant urged the court to set aside the trial court's judgment on liability and quantum, enter its own determination, consider the appellant's submissions and allow the appeal.

Respondents' Submissions

21. The Respondent relied on the holding in *Simon Muchemi Atako v Gordon Osore* (2013) eKLR, *Komatsu Mbuvi v Augustine Munyao Kioko* (2006) eKLR, and *Peter v Sunday Post Limited* (1958) where the Court stated that the appellate court should not interfere with the trial courts finding unless the finding is based on no evidence or on a misapprehension of the evidence or the finding was clearly wrong. If the finding was sustainable either way it should be upheld.
22. The Respondents submit that the plaintiffs called two doctors who testified and stated that the cause of death of the deceased was silicosis and it was caused by exposure to dust at work and the disease has the same symptoms as tuberculosis.
23. The Respondents submit that the court fully considered the evidence adduced and concluded that the plaintiffs had fully proved their case and gave a judgment.
24. The Respondents submits that the Court relied on expert's opinion from two doctors and expressly held that the defence/appellant did not avail any contrary opinion for the court to consider in rebuttal of the evidence adduced by the Plaintiffs.
25. The Respondents further submit that the Appellant knew that the deceased had been unwell and it gave him many sick offs before terminating his services.
26. The Respondents submit that the trial court gave a sound basis for its findings. They urged the court to dismiss the grounds of appeal on liability.
27. The Respondents submit that there is no appeal against the awards of damages for loss of expectation of life, lost dependency, or special damages. That the appeal is against the award of Kshs.1,000,000/= for pain and suffering only.
28. The Respondents submit that the award for pain and suffering is for the slow death from an occupational disease over a long period of time. The suffering includes anxiety caused by the condition and the tuberculosis treatment the deceased took for almost one year with no improvement.



29. The Respondents submit that the trial court relied on the holding in the case of Juma Lukale Olutali v Eveready Batteries (K) Ltd (2017) eKLR where the High Court awarded Kshs.1,000,000/= to a victim of the occupational disease of bronchitis.
30. The Respondents urged the court to find no error of principle or method of approach or in the assessment of damages by the trial court and dismiss the appeal against quantum.

Analysis and Determination

31. As a first appellate Court, this Court has a singular duty to re-evaluate the entire case and come up with its own findings as was held in the case of *Selle v Assorted Motor Boat Company* 1968 EA Company 1968 EA 123-126 where the Court stated as follows:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge’s findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

32. The Appellant has appealed against the lower court’s decision on both liability and quantum. The issues for determination are therefore whether the Lower Court erred in finding the Appellant liable for the Respondent’s occupational disease and therefore his death and whether the award of damages was in error.

Liability

33. The Respondents are Administrators of the estate of Dominic Kioko Mwisyo (deceased) who was an employee of the Appellant. They obtained letters of administration ad litem.
34. According to the Respondents, the Appellant is in the business of mining and making cement. It was their case that due to the negligence of the Appellant, the deceased was exposed to inhalation of silicon over the years he worked with the Appellants and contracted silicosis. That the employment of the deceased was terminated by the Appellant due to his ill health. They prayed for special damages of Kshs.51,160/= as specified in paragraph 11(1)(a) to (e) of the plaint dated 30th September 2013. They further prayed for loss of earnings, lost years, damages for pain and suffering and loss of amenities, damages for loss expectation of life and loss of dependency.
35. In the defence filed by the Appellant on 25th November 2013, the Appellant denied that the deceased was exposed to silicon and contracted silicosis while in its employment. The Appellant further denied breach of contract, statute and duty of care as set out in the plaint. It averred in the alternative that the injuries to the deceased, if any, were wholly or partly caused by the negligence of the deceased.
36. At the hearing the Respondents called three witnesses being Dr. Washington Wokabi (PW1), Agnes Kameme Mwisyo (PW2), a sister to the deceased and 1st Respondent and daughter to 2nd Respondent who is the mother to the deceased, and Dr. Joshua Nderitu (PW3). The Appellant called one witness Petr Ndang’u Kwinga, its Human Resources Manager. The Appellant did not file any documents while the Respondents filed a list and bundle of 42 documents in support of their case.
37. After hearing the parties, the Trial Magistrate found the Appellant liable and awarded as follows:



- i. Liability 100% in favour of the plaintiffs
 - ii. Pain and suffering Kshs.1,000,000
 - iii. Loss of expectation Kshs.100,000
 - iv. Loss of dependency Kshs.716,300
 - v. Special damages Kshs.21,060
- Total Kshs.1,858,420

38. The Trial Court found that it was undisputed that the deceased was an employee of the Appellant. The Trial Court further found that the cause of death of the deceased was silicosis or pneumoconiosis, agreeing with the opinion of the two medical doctors called by the Respondents. The Trial Court observed that the defence would have rebutted the opinion of the medical experts by subjecting the treatment records in respect of the deceased to analysis by another medical expert which the Appellant did not.

39. The Trial Court further found as follows:

“Certainly, the deceased worked in the mining industry according to the evidence. The certificate of service that DW1 confirmed he issued states he was working at Silicate Department. I note DW1 disputed the allegation that the plaintiff was exposed to raw Silicon and said he was dealing with Sodium Silicate. I reckon that this does not rule out the possibility that the component the deceased was dealing with contained Silicon in solid or liquid state. Simply put, the defence did not place before the court evidence on the chemical component of the substance the deceased ordinarily processed to exclude the possibility that it contained Silicon. I am satisfied that the plaintiffs have proved on a balance of probability that the deceased died due to lung damage caused by Silicosis or Pneumoconiosis. The Second Schedule of the *Occupational Safety and Health Act*, 2007 prescribes the disease as occupational. The Act also prescribes the nature of occupation as:

“the mining, quarrying and dressing of sandstone, slate and granite; any occupation involving exposure to asbestos dust; iron and steel foundry work; steel dressing; work in the pottery industry; the manufacture of refractory products such as silica bricks; any dusty process which results in pneumoconiosis.”

40. The Trial Court further found that the Appellant did not prove that it provided the employees with protective gear. Relying on Section 6 of the *Occupational Safety and Health Act* and the decision in *Purity Wambui Murithii v Highlands Mineral Water Co. Ltd* [2015] eKLR, the Trial Court found the Appellant 100% liable.

41. I have reviewed the documents produced by the Respondent, the testimony of the witnesses who testified during the trial and the judgment of the Trial Court.

42. PW2 testified that the deceased died at Machakos Level Five Hospital and produced the death certificate. She testified that the deceased started working at Athi River Mining Company Limited, the Appellant in 2003 as a casual but was employed permanently in 2007. That he started ailing in 2007 and left employment in 2008.

43. PW2 testified that the deceased used to cough a lot. That he was initially treated at Athi River Health Centre from where he was referred to Machakos Level Five Hospital and put on drugs for Tuberculosis.



44. She testified that the deceased was also treated at Shalom Hospital in Machokos, St. Mary's Hospital Nairobi and finally at Kenyatta National Hospital. That he died while undergoing treatment at Machakos Level Five Hospital.
43. PW1, a consultant surgeon who prepared a detailed medical report for the deceased testified that he examined the deceased and reviewed his medical records and his opinion was that the deceased was suffering from an occupational disease as the same could not be cured, that the deceased had suffered a condition known as pneumoconiosis which was caused by exposure to silicon. He testified that the disease was incurable and was caused by ingestion of silicon into the lungs. He testified that the CT scan of the chest of the deceased revealed he was suffering from silicosis. That he ruled out tuberculosis because the deceased had been treated for tuberculosis twice but failed to get better. That all types of tuberculosis are curable.
44. PW3, also a medical doctor at Machakos Level Five Hospital testified that the deceased had lung complications having been diagnosed at Kenyatta National Hospital. That the cause of the disease was exposure to silicon at work. That the deceased had irreversible lung damage and was only given supportive treatment having already been treated twice for tuberculosis.
45. He testified that signs of position of silicon in the lungs was visible in the CT scan. PW3 further testified that the kind of environment that leads to silicosis was in mining industries, cotton industries and dealing with things like ballast causing dust to get into the lungs and damage to airways which is irreversible. He stated that the person who prepared the death certificate was not necessarily a doctor and did not have the opportunity to review the medical and treatment records.
46. Having gone through the evidence on record, I find that the findings of the Trial Magistrate are supported by the evidence on record and that there was no error in finding the Appellant 100% liable to the occupational diseases that led to the death of the deceased through exposure to silicon at the pace of work.

Quantum

47. The Appellant submitted that the award of Kshs.1,000,000/= for pain, suffering and loss of amenities of life was excessive. As rightly submitted by the Appellant, courts have made awards for pain and suffering based on the circumstances of each case, based on the nature of the injuries sustained and the duration and severity of suffering before death occurred.
48. The Appellant urged this Court to award Kshs.20,000/= relying on the decision of Justice H. P. G. Waweru dated 25th July 2014 in the case of Tessie Margaret Kariuki & another v Shaklangakwa Jirongo & another (Nairobi HCCA No. 123 of 2008).
49. The Respondents on the other hand support the award by the Trial Court. The Trial Court relied on the decision in the case of Juma Lukale Olutali v Eveready Bakeries (K) Limited [2017] eKLR where the Court awarded Kshs.1,000,000/= to a victim of occupational bronchitis.
50. In the case of Yobesh T Tinega v Gertrude Wakio Nyange & another (Suing as the Legal Administrators of the Estate of Francis Nyagwa Chiomayo – deceased) Nyamira Civil Appeal No. 22 of 2021, Njagi J. N. reviewed several decisions on this subject and reduced the award of Trial Court of Kshs.200,000/= to Kshs.120,000/= on grounds that the deceased died one month after the accident
51. In the instant case the deceased suffered for four years. He had to leave employment in 2007 due to his ill health. Between 2007 and 2010 when he died, he endured a lot of suffering. His sister PW2 narrated that the deceased used to cough a lot. That he had breathing problems and was so weak he could not



walk. He endured two treatments of tuberculosis, each of which lasted eight months and he did not get better.

52. PW3 testified that the deceased was breathless and was dependent on oxygen. The medical records show that the deceased was wasting away. He died at the hospital before being attended to after suffering for almost four years.

53. I therefore would agree with the Trial Magistrate's award of Kshs.1,000,000/= for pain and suffering.

54. As was held in the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR:

“The general accepted principle is that very nominal damages will be awarded on this head (pain and suffering) if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged.”

55. I therefore find no reason to interfere with the Trial Magistrate's award of Kshs.1,000,000/= under this head.

Loss of Expectation of Life

56. The Appellant had no issue with the award of the Trial Magistrate of Kshs.100,000/= being the conventional award under this head.

Damages under the Fatal Accident's Act

Loss of Dependency

57. The Trial Court awarded Kshs.716,300/= using a multiplier of 25 years. Counsel for the Respondents had proposed a multiplier of 32 years in view of the fact that the deceased was 28 years old at the time of death and was expected to retire at 60 years. Counsel for the Appellant had on the other hand proposed a multiplier of 20 years taking into account the vicissitudes and vagaries of life.

58. The deceased was aged 28 years at the time of death and had no dependents other than his mother, the 2nd Respondent. His salary at the time of leaving employment was Kshs.7,163/= as is evident from pay

slips filed in Court at pages 26 to 29 of the Record of Appeal. The Trial Magistrate applied a ratio of $\frac{1}{3}$.

59. In the case of *Butt Khan (1977) 1 KAR* the Court held as follows:

“An Appellant Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

60. I do not find any justification to interfere with the award of the Trial Magistrate as I did not find the award to be inordinately high and neither did the Trial Court take into account any principles inconsistent with the award.

61. For the foregoing reasons I find the instant appeal is devoid of merit and dismiss it in its entirety with costs to the Respondents both in the appeal and in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF NOVEMBER 2022



MAUREEN ONYANGO
JUDGE

