REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 10 OF 2016

(Before D. K. N. Marete)

UNILEVER TEA (K) LIMITED…….....APPELLANT

VERSUS

ALICE CHEPNGETICH TANUI

(suing as the personal Representative of the Estate of

Mathew Kiprotich Tanui – (Deceased).....RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Appeal dated 15th April, 2014. It seeks the following finding and orders of court;

*1. That learned trial Magistrate erred in law and fact in finding the Defendant **90%** liable when the plaintiff failed to prove any iota of negligence on the Defendant's part during trial.*

*2. That the learned trial Magistrate erred in Law and in fact in finding that the Appellant do pay the Respondent a gross sum Kshs.**1,454,000**/= (subject to **10%** liability) in Damages which award is arbitrary and unwarranted in the circumstances, the Plaintiff having failed to establish the Appellant's negligence in the first place.*

3. That the learned trial Magistrate erred in Law and in fact in not finding that the Respondent had not established that the deceased's estate had suffered any loss warranting the awarded sum.

4. That the learned trial Magistrate erred in law and in fact while computing the loss of Dependency suffered by the Deceased's Estate when using income of

***Kshs.12,000/=** where income pleaded in the plaint was Kshs.8,000/=*

*5. That the learned Trail Magistrate further erred in law and in fat by awarding the Deceased's Estate a multiplier of **14 years**.*

6. That the learned trial Magistrate erred in law and in fact in not taking into account entirely the submissions of the Appellant.

7. That the learned trial Magistrate erred in law and in fact in awarding the Respondent a generous award on loss of dependency when there was no proof of income by this Respondent, or alternatively when the income pleaded was lower than as awarded.

8. That the gross award of Kshs.1,454,000/= is so manifestly his as to amount to an erroneous estimate of the damage suffered by the Respondent.

The Appellant prays for relief and judgment as follows;

a) That this Appeal be allowed

b) That the entire Judgement of the Chief Magistrate dated 18th March, 2014 be set aside and in its place an order of dismissal of the plaintiff Respondent's suit as against the Appellant be entered.

c) That alternatively, and without prejudice to prayers (a) and (b) above, the Judgement of the Chief Magistrate dated 18th March, 2014 be set aside and or varied as against the Appellant.

d) That the Appellant do have the costs of this Appeal.

The respondent in his written submissions dated 24th November, 2017 opposes the appeal and prays that the same be dismissed for want of merit.

The appellant at the onset faults the finding of the learned magistrate and submits that the finding of 90% liability against the appellant was against the weight of the evidence adduced at trial. It is her submission that the evidence of DW 1 at page 56 of the Record of Appeal is that the tractor the subject matter of the accident and which was driven by the deceased was in good condition. Later, this is contradicted at cross-examination where he stated that the delivery note issued to the driver did not indicate the condition of the car.

The appellant further faults the computation for loss of dependency by the trial magistrate at an income of Kshs.12,000.00 whereas the income pleaded was Kshs.8,000.00. It is her further submission that the magistrate erred in adapting the figure of Kshs.12,000.00 as indicated in the deceased's payslip. On this, she relies on the authority of **John Wilkins v Buseki Enterprises Limited [2015] eKLR**, the court observed thus;

Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others 2014 eKLRviz:

*"Support in contention, the appellant cited the decision of the **Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu (1998) MWSC 3**, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The present importance of pleadings". The same was published in [1960] current legal problems, at p174 whereof the author had stated;*

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading……for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is a bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the

specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieve; for a decision given on a claim or defence not made or raised by or against a party is

equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business" in the sense that points other than those specific may be raised without notice.:

The appellant further submits a case against the award of special damages and argues that none of the special listed at paragraph 10 of the plaint were proven.

It is her case that no receipts were tendered for the abstract, death certificate, motor vehicle search or for application of grant of letters of administration. PW 1 did not also lead evidence on the amount spent on funeral expenses. This cannot be left to the court to estimate as the onus of proof always laid on the plaintiff's. The absence of proof therefore warrants that these be declined.

Lastly, the appellant submits that lost years is not an award where the litigant sues under the Fatal Accidents Act and Law Reform Act and the award thereof should also be declined.

The respondent in submissions dated 24th November, 2017 reappraised and submitted on the role of this court in reconsidering and re-evaluating the evidence adduced at the trial court as follows;

This being the first appeal, this court is mandated to reconsider and reevaluate the evidence adduced at the trial court. The reason for this is so as to arrive at an independent decision whether or not to uphold the finding of the trial magistrate as follows;

"I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of the facts of the trial court in order to determine whether the conclusion reached on the evidence should stand." See peters vs Sunday post (1958) EA 424. More recently, this court has held that it will not likely differ with the findings of fact of a trial court who had the benefit of seeing and hearing all the witnesses…"

This cannot be gainsaid.

It is her further submission that the learned magistrate in coming up with an award on liability took into consideration all the factors and evidence at hand. She submits as follows;

After hearing rival testimonies, the learned trial court had this to say;

"I have carefully appraised the evidence on record. There is no dispute that the deceased was an employee of the defendant. There is also no dispute that on the material date the deceased was driving the defendant's tractor and that this tractor was involved in an accident occasioning the deceased fatal injuries. The plaintiff produced evidence to show that the deceased was a hard working employee and for this he was recognized by the defendant. No evidence was adduced by either the plaintiff or the defendant on how the accident occurred. With such a good work record I cannot blame the deceased for the accident and hold the defendant liable. I will however apportion liability in the ratio of 90% to 10% on the basis that it was the plaintiff who was in charge of the tractor."

The respondent further submits that the appellant cannot now fault the plaintiff for not calling the police officer to adduce evidence on the removal from the police station before an evaluation or inspection was done. Instead, the appellant should have availed at trial the accident inspection report in respect to the accident tractor. This would have been easier and truer in the circumstances. She puts this as follows;

She adds the fact that she did not do that points to two things; one, the plaintiff's allegations are true or, two, that the tractor was inspected and found be faulty but she decided to hide the report from the court.

On quantum the respondent submitted that the appellate court can only interfere with the judgement of the trial court in cases where the court is satisfied that:-

> *1. Either the trial Magistrate, in assessing damages, took into account an irrelevant factor or left out on account a relevant factor, or*
>
> *2. The amount is inordinately so high or so low that it must be a wholly erroneous estimate of damages. Se* ***SOKORO SAWMILLS LTS = VS=GRACE (2006) eKLR*** *attached for … ease of reference.*

In further amplification of her submission above, the respondent sought to rely on the authority of **Sosphinaf Co. Ltd & Anor = vs= Daniel Ng'an'ga – Nakuru Civil Appeal No. 315 of 2001** (Appeal from the judgement of the High Court of Kenya at Nakuru (Rimita J) dated 23rd day of March, 2001

At page 2 – 3 it states:-

> *The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous award for similar injuries and the principles developed by the court, ultimately, what is a reasonable award is an exercise of discretion by trial Judge and will invariably depend on the peculiar facts of each case.*
>
> *In this case, the trail Judge considered the evidence of the Respondent, the three medical reports which he quoted extensively, the submissions of respective counsel and the authorities cited to him in arriving at what he referred to as adequate compensation".*
>
> *It is evident from the medical reports that the Respondent sustained a severe head injury resulting in the deformity of the skull which deformity has exposed the Respondent to further brain injury.*
>
> *It has not been shown that in assessing the damages the learned Judge failed to apply the relevant principles nor can it be justifiably said that the award is in the circumstances of the case so high that it amounts to an erroneous estimate. There are no valid grounds, in our view, for interfering with the award.*

Lastly, the respondent handles the matter of the discrepancy between the amount of Kshs.8,000.00 and Kshs.12,000.00 utilized in the computation of quantum as follows;

> *In his submissions, the appellant has faulted the court for not using the amount of Kshs. 8000/= per month is arriving at the loss of dependency. The appellant claims that is the figure that the plaintiff pleaded in here plaint.*
>
> *…, that is not true. At page six of the record of appeal, paragraph 7 (b) of the plaint, the plaintiff pleads that the defendant used to earn approximately Kshs.8000/=.*
>
> *We submit that the issue of earnings is a matter of fact. A payslip was submitted in evidence before the trial court. This is how the court addressed the issue;*
>
> *"under the head of loss of dependency, I have considered evidence by the plaintiff through the pay slip exhibited showing that his gross salary was Kshs.12,843/=. The only statutory deductions were Kshs.12,00/=. The plaintiff has suggested a multiplier of 16 years and the defendant suggested a multiplier of 8 years. My view is that a multiplier of 14 years is reasonable."*

This appeal sounds like a storm in a tea cup. The appellant at the onset raises issues on the substance of the finding of the trial court on the basis of lack of evidence by the plaintiff/respondent. This is rebuffed by the able submissions of the respondent that at all times, the respondent herein at trial proved her case on a balance of probability.

In rebuttal to the case and submission on impropriety of quantum, the respondent submits that the trial court took all relevant factors in coming up with the award. The authority of **Sosphinaf Co. Ltd & Anor vs Daniel Ng'an'ga** (supra) is clearly illustrative of what is required of an appellate court in interfering with an award by a lower court.

This appeal therefore has no merit. The issues raised therein are lacking in legal basis.

I am therefore inclined to dismiss the appeal with orders that each party bears their own costs of the appeal.

Delivered, dated and signed this 15th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Mutiria instructed by Moronge & Company Advocates for the appellant.

2. Mr. Meroka instructed by Meroka & Company Advocates for the respondent.