



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 68 OF 2015

BETWEEN

SUKARI INDUSTRIES LIMITED APPELLANT

AND

CLYDE MACHIMBO JUMA suing as the legal representatives of the

estate of JOHN JUMA MACHIMBO (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. R. Kipyegon, RM in the Resident Magistrates Court at Ndhiwa in Civil Case No. 38 of 2014 dated 25th September 2015)

JUDGMENT

1. The deceased was employed as a loader by the appellant. On 11th May 2014, together with other employees, he went to Pala to collect sugarcane. On the way, the front wheel of the tractor they were travelling in came off causing the trailer to fall and hit the deceased who died immediately thereafter. The deceased's dependants and estate filed a suit seeking damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. By a judgment dated 25th September 2015, the learned magistrate made the following award in favour of the respondent which has now precipitated this appeal;

Damages under the Law Reform Act (Chapter 26 of the Laws of Kenya)

- | | |
|--------------------------------|-----------------|
| a. Pain and suffering | Kshs. 50,000/- |
| b. Loss of expectation of life | Kshs. 100,000/- |

Damages under the Fatal Accidents Act (Chapter 32 of the Laws of Kenya)

Lost Dependency **Kshs. 1,000,000/-**

2. When the appeal came up for hearing counsel for the appellant, Mr Maganda, attacked the assessment of damages on the ground that the learned magistrate proceeded on wrong principles in two respects. First, he submitted that the deceased died on the spot hence the learned magistrate erred in awarding damages for pain and suffering. Second, he contended that the learned magistrate failed to deduct the award under the **Law Reform Act** from the total award hence there was a duplication of awards and that the award under the **Law Reform Act** should be set aside.
3. Counsel for the respondent, Ms Kuke, supported the findings of the learned magistrate and submitted that there was evidence upon which the court could find that the deceased suffered pain

hence the award for pain and suffering, which was reasonable, was justified. She further urged that the respondent was entitled to damages under both the **Law Reform Act** and the **Fatal Accidents Act** as the principal of duplication did not arise in this case.

4. As this is an appeal on quantum of damages, the general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, erred in principle and either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another** [1982-88] 1 KAR 727, **Peter M. Kariuki v Attorney General** CA Civil Appeal No. 79 of 2012 [2014]eKLR) and **Bashir Ahmed Butt v Uwais Ahmed Khan** [1982-88] KAR 5).
5. On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.
6. As regards the argument that the respondent was awarded double compensation, I would do no better than quote what the Court of Appeal stated in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited** NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR that;

*[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the **Law Reform Act** and dependants under the **Fatal Accidents Act** are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the **Fatal Accidents Act** should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the **Law Reform Act**, hence the issue of duplication does not arise.*

7. Before I pen off the judgment, I must deal with two issues which, though not raised, are important when dealing with claims of this nature particularly when the beneficiaries are children. The first issue concerns the dependants of the deceased. The proceedings in the subordinate court were brought on behalf of the deceased's father, mother, wife, daughter, three brother and sister. The deceased was married with one daughter aged 1 year. The dependants contemplated under the **Fatal Accidents Act** are expressly defined under **section 4(1)** as follows;

Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall.....be brought by and in the name of the execution or administrator of the person deceased].....
[Emphasis mine]

The brothers or sisters of the deceased are not dependants for purposes of the **Fatal Accidents Act** and are therefore not entitled to the proceeds of the judgment and any award to them would definitely reduce the child's entitlement.

8. The second issue is that when the court makes an award under the **Fatal Accidents Act**, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the respondent to file the necessary application for consideration before the subordinate court

in due course. As a matter of law where the amount is for the benefit of a child or children there must be a continuing trust under **section 58** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* this the amount must be held by more than one trustee.

9. The result of my finding is that the appeal is devoid of merit and must be and is hereby dismissed with costs to the respondent which I assess at Kshs. 50,000.00 all inclusive. The decretal sum due to the respondent shall be released only after compliance with the terms of **section 4(1)** of the *Fatal Accidents Act* as set out in paragraph 10 and 11 above.

DATED and DELIVERED at HOMA BAY this 15th day of February 2016.

D.S. MAJANJA

JUDGE

Mr Maganda instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Kuke instructed by Kuke and Company Advocates for the respondent.