



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 55 OF 2015

BETWEEN

SUKARI INDUSTRIES LIMITED APPELLANT

AND

DANIEL OKECH ONGOLO suing as the administrators of the

estate of JOSHWA ONGOLO ODONGO(Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. O. Omwansa, SRM in Principal Magistrates Court at Ndhiwa in Civil Case No. 35 of 2015 dated 27th May 2015)

JUDGMENT

1. The respondent, as personal representative and administrator of the estate of the deceased, filed the suit against the appellant seeking compensation for an accident that occurred on 3rd July 2013 while the deceased was driving the respondent's tractor transporting cane. The learned magistrate apportioned liability at 80:20 in favour of the respondent and awarded **Kshs. 416,000/-** made up as follows;

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

- | | |
|--------------------------------|-----------------|
| a. Pain and suffering | Kshs. 20,000/- |
| b. Loss of expectation of life | Kshs. 100,000/- |

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

Loss of dependency ***Kshs. 400,000/-***

2. Counsel for the appellant informed the court that that the only issue in contention in this appeal is the amount awarded for loss of dependency under the ***Fatal Accidents Act*** as the learned magistrate erred in calculating the multiplicand. He submitted that the deceased was a driver hence in the absence of proof of income, the court ought to have used the minimum wage provided under ***Regulation of Wages (General) Amendment Order, 2012*** for a driver to arrive at a multiplicand of Kshs. 7,113/-.

3. Ms Kuke, counsel for the respondent, supported the judgment and submitted that the respondent had proved that in addition to the his income as a driver, the deceased was earning income from other farming activities which the learned magistrate took into account.
4. The general principal applicable in this appeal is that 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. According to the pleadings, the deceased was aged 45 years and was in good health earning about Kshs. 40,000/- per month. The deceased's son (PW 1) testified that the deceased was 50 years old at the time of death and that he was employed by the appellant where he was earning Kshs. 20,000/- per month. He was also a businessman earning between Kshs. 40,000/- and Kshs. 50,000/- per month from sugar cane and that he had motor boats for fishing. PW 2 confirmed that the deceased was working as the appellant's driver.
6. In computing the multiplicand the learned magistrate held that respondent did not adduce any documentary evidence to show what the deceased was earning and in the circumstances, he adopted a sum of Kshs. 10,000/- per month as the minimum wage for a driver.
7. I find and hold that the learned magistrate erred in adopting as sum by reference to the ***Regulation of Wages (General) Amendment Order, 2012***. This was improper as there was sufficient evidence that the deceased was earning income as a driver and businessman. The deceased was employed by the appellant and his income as stated by PW 1 was not rebutted and a matter of evidence it was a matter within the appellant's knowledge. The learned magistrate also failed to have regard to the principle, accepted by the Court of Appeal, that it would be wrong to insist on documentary evidence to prove income where there evidence that the deceased was employed or in business (see ***Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002* [2005]eKLR**). Hence, in as much as I fault the learned magistrate's assessment of the multiplicand, there was no cross-appeal on this aspect of the evidence and finding. The multiplicand adopted by the court was reasonable and consistent with the evidence.
8. I therefore affirm the judgment. The appeal is dismissed with costs to the respondent. The costs are assessed at Kshs. 45,000/- all inclusive.

DATED and DELIVERED at HOMA BAY this 14th day of December 2015.

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.



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