



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 484 OF 2013**

**SECUREX AGENCIES KENYA LTD.....APPELLANT**

**VERSUS**

**PAUL OTIENO WAMBEDHA.....RESPONDENT**

**(Being an appeal from the judgment of Hon. Ole Keiwua (Mr.) RM**

**delivered on 23<sup>rd</sup> August, 2013 in Milimani Chief Magistrate Court Case No. 2474 of 2013)**

**JUDGMENT**

1. The Respondent instituted the case herein against the Appellant through the amended plaint dated 1<sup>st</sup> April, 2004. The claim is for damages arising out of a road traffic accident involving the deceased, Meshack Owila Alago and motor vehicle registration No. KAL 641Q owned by the Appellant. The Respondent blamed the accident on the negligence of the driver of the motor vehicle.

2. The Respondent filed the Defence dated 6<sup>th</sup> April, 2004 and denied the claim. In the alternative, it was stated that the accident was caused by the deceased's negligence.

3. The case proceeded to a full trial. The Plaintiff testified herein (PW 2) together with the Police Officer, PW2 PC Elphus Nakuru. The police officer in his evidence stated that the deceased was trying to cross the road when the accident occurred. PW2's evidence was that the family suffered loss and incurred expenses.

4. The Respondent's Human Resource Manager testified and stated that the motor vehicle in question was not owned by the Respondent but by Security Alarms.

5. The trial magistrate entered judgment on liability at 80% against the Appellant and 20% against the Respondent. The Trial magistrate awarded Kshs.20,000/= for pain and suffering, Ksh.100,000/= for loss of expectation of life, Ksh.11.485/= special damages and a global sum of Ksh.300,000/= for loss of dependency.

6. The Appellant was aggrieved by the said judgment and Appealed on 5 grounds as follows:

**1. The learned magistrate erred in not differentiating the fact (as proved) that Securex Agencies Kenya Limited is a different legal entity from Securex Alarms Limited whose (Securex Alarms Limited) vehicle registration number KAL 641Q was involved in the suit accident.**

**2. The learned magistrate found 80% percent liability on part of the defendant when there was no liability at all.**

**3. The learned magistrate found such liability when there was no evidence whatsoever as regards how the said accident occurred.**

**4. The learned magistrate awarded a sum of Ksh.100,000/= under the Law Reform Act when such sum would merge in damages under the Fatal Accidents Act.**

5. The learned magistrate threw caution to wind in writing a judgment which was based on surmises only.

7. The Appeal was canvassed by way of written submissions which I have considered.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”.**

9. PW1 the Police Officer produced the police Abstract as an exhibit. His evidence was that the accident occurred between the deceased who was crossing the road and the motor vehicle herein. He further testified that the accident was still pending investigations and that there was no evidence that established the point of impact.

10. The police abstract reflects that the deceased was a pedal cyclist. The name and address of owner of the motor vehicle is given as **“Francis Gatimu c/o Securex Box 48399 Tel 746321 Nairobi”**. The results of the investigations are reflected as **“pending under investigations”**. On the face of it, the abstract does not say that Francis Gatimu or **“Securex”** were either the driver or the owner of the motor vehicle. The evidence of PW1 failed to shed any light on the entries reflected in the police abstract.

11. The evidence of PW2 essentially reflects the loss the family of the deceased suffered and the expenses incurred. Both PW1 & 2 adduced no evidence on how the accident occurred. No eye witness was called and the evidence on record is only on the fact that the accident occurred. No Log Book or any other evidence was produced in support of the Appellant being the registered owner, the beneficial owner or otherwise. The issue of ownership of the motor vehicle cannot be said to be *res judicata*. I have not seen any determination by the trial court on the issue on merits.

12. On the other hand, DW1 produced a certificate of incorporation for Securex Agencies (Kenya) Limited and stated that that the Appellant does not own the motor vehicle herein. It is not clear how the Respondent arrived at the name of the Appellant herein. The certificates of incorporation produced by the Appellant’s witness reflect that Securex Agencies Kenya Limited and Securex Alarms Limited are two different companies and are therefore separate legal entities.

13. On the burden of proof, the Evidence Act Cap 80 provides as follows:

Section 107 (1):

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

Section 108

**The burden of prove in suit or proceedings lies on that person who would fail if no evidence at all were given on either sides.**

Section 109

**“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 any particular person.”**

14. After evaluating the evidence herein, I find that the Respondent failed to prove his case and it ought to have been dismissed.

15. The award of Ksh.100,000/= for loss of expectation of life is reasonable and falls within the range of awards in similar cases. I would not have interfered with the same. I do not agree with the Appellant’s argument that the amount would be a double award taking into account the award under the Fatal Accidents Act.

16. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

**“.....An award under the law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act and so it appears the Legislature intended that it should be considered. Section 2(5) of the Law Reform Act says this:**

**“(5) the rights conferred by this part are for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased person by the Fatal Accidents Act... To be taken into**

account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Act are “taken into account.” The Section says what should be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in mathematical deduction as suggested by Mr. Barasa.”

17. The Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd [2015] eKLR** expressed itself thus:

“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.”

18. In the upshot, I find merits in the Appeal and allow the same. Consequently, I set aside the judgment of the Lower court and substitute the same with a judgment dismissing the case with costs. The costs of the Appeal to the Appellant.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of Feb.,2021**

**B. THURANIRA JADEN**

**JUDGE**