



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 20 OF 2020

PETER NGWILI WAMBUA (Suing as legal representatives of the

Estate of SAMMY MBOYA WAMBUA (Deceased).....APPELLANT

VERSUS

ALI MWANZIA KELLY.....RESPONDENT

(Appeal from the judgment and decree (Hon. S.M. Shitubi, CM) dated 21st May, 2020 in CMCC No. 100 of 2019 at the Chief Magistrate's Court Kajiado)

JUDGMENT

1. The appellant filed a suit at the Magistrate's Court, Kajiado under both the Fatal Accidents Act and the Law Reform Act, on behalf of the estate of Sammy Mboya Wambua, (deceased) who died in a road accident which occurred along Isinya-Kitengela road on 5th August, 2016, involving motor vehicle registration number KCC 419 H, owned by the Respondent. The appellant sought both general and special damages. The appellant attributed occurrence of the accident to the negligence of the driver of that motor vehicle.
2. The Respondent filed a defence denying any negligence on his driver's part. He instead attributed the accident to the negligence of the deceased. He sought for the dismissal of the suit with cost.
3. On 21st November 2019, parties recorded consent on liability in the ratio of 70%:30% against the respondent and the appellant respectively. The matter then proceeded for assessment of damages. In a judgment delivered on 21st May, 2020, the trial magistrate dismissed the appellant's suit with costs.
4. The Appellant being aggrieved with the trial court's judgment, filed a memorandum of appeal dated 11th June, 2020, raising the following grounds, namely:
 - a. **THAT the learned trial magistrate erred in law and in fact when she failed to find that the appellant had proved his case against the respondent on a balance of probability.**
 - b. **THAT the learned trial magistrate erred in law and in fact in failing to find that the parties had recorded consent on liability in court in which the Respondent had conceded 70% on liability.**
 - c. **THAT the learned trial magistrate erred in law and in fact by dismissing the Appellant's case when the evidence on record was sufficient to hold the Respondent liable at 70%.**
 - d. **THAT the learned trial magistrate erred in law and in fact in coming to the conclusion that she did without any or any good of sufficient cause.**
 - e. **THAT the learned trial magistrate erred in law and in fact in considering extraneous matters while making her decision which were based on speculation and not supported by evidence on record.**
 - f. **THAT the learned trial magistrate erred in law and in fact in finding that there was contradiction of the testimony of the Appellant and the evidence on record in regard to the survivors of the deceased.**
 - g. **THAT the learned trial magistrate erred in fact and in Law in holding that she was not sure whether the Appellant and**

the other dependants of the deceased were genuine.

h. THAT the learned trial magistrate erred in law and in fact in holding that the Appellant failed to disclose the dependants of the deceased.

i. THAT the Learned trial magistrate erred in law and in fact in failing to find that the Appellant had filed the suit under both the Fatal Accidents Act Cap 32 Laws of Kenya and the Law Reform Act Cap 26 Laws of Kenya.

5. This appeal was disposed of by way of written submissions.

6. The appellant submitted through his submissions dated 11th February, 2021 and filed on same date, that he proved his case against the respondent on a balance of probability, and that the evidence on record was sufficient to hold the Respondent 70% liable. He argued that he discharged his evidential and legal burden and proved his case on a balance of probabilities as required by sections 107(1), 109 and 112 of the Evidence Act. According to the appellant, his list of documents dated 17th May, 2019 were produced and admitted and consent on liability was recorded in the ratio of 70%:30% in his favor on 21st November, 2019.

7. The appellant further argued that the defence failed to call any witness to controvert his evidence hence the respondent's pleadings remained mere pleadings. He relied on **Trust Bank Limited v Paramount Universal Bank Limited & 2 others** [2009] eKLR.

8. On the whether the trial magistrate erred in holding that she was not sure whether he and the other dependants of the deceased were genuine, the appellant submitted that he was genuine and honest when he filed this suit. This is evidenced by the fact that the chief's letter dated 30th October, 2017 confirmed that he (appellant), Joseph Mutisya Wambua and Richard Maluki Wambua whose parents are deceased as indicated in the plaint are brothers of the deceased and the Limited Grant of letters of administration Ad Litem were obtained legally. Hence, the trial magistrate erred in holding otherwise. He relied on **Mohammed Hassim Pondor (Suing on behalf of the International Air Transport association –IATA & another v Nordic Tours & Safaris Ltd & 2 others** [2020] eKLR.

9. The appellant faulted the trial court for holding that he had failed to disclosed that the deceased had two daughters who had gone with their mother. He argued that he did not know their whereabouts or their names as the deceased parted with the wife two years before his death, taking into account of his age (74 years) at the time of testifying. He also stated that they did not attend the deceased's burial, and it can be inferred that they had abandoned the deceased and their state of relationship was unknown, a fact that was corroborated by the chief's letter.

10. The appellant also complained that the trial magistrate erred in failing to find that he had filed the suit under both the Fatal Accidents Act and the Law Reform. According to the appellant, although the suit was brought under both the Fatal Accidents Act and the Law Reform Act, the trial magistrate only focused on the Fatal Accidents Act and left out the Law Reform Act that provides for pain and suffering and loss of expectation of life, thus denied the deceased's estate damages under the Law Reform Act. He relied on section 2(1) and (5) of the Law Reform Act. He also relied on **Ishmael Nyasimi & another V David Onchangu Orioki (suing as personal representative of Antony Nyabando Onchango (Deceased)** [2018] eKLR and **Hellen Waruguru Waweru (suing as the legal representatives of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited** (NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR).

11. The appellant further relied on **Florence Mumbua Ndoe & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & another** [2017] eKLR, for the argument that siblings are recognized as beneficiaries in a deceased estate, hence the trial magistrate erred under this head. He urged the court to award Kshs. 200,000/= for pain and suffering and Kshs. 250,000/= for loss of expectation of life. He also urged for special damages of Kshs. 141, 550/= as they were pleaded and proved. He relied on **EMK & Another v O.O** [2018] eKLR and **Mwita Nyamohanga & Another v Mary Robi Moherai (Suing on behalf of Agnes Boke Mwita Another** (Migori, Civil Appeal No. 3 of 2014 [2015] eKLR).

12. The appellant prayed that the appeal be allowed, the trial court's judgment be set aside and he be awarded damages under the Law Reform Act and special damages together with the costs of the appeal.

13. The respondent filed his submissions dated 11th January, 2020 on 13th January, 2021. He argued that the trial magistrate did not err in dismissing the appellant's suit. It was the respondent's contention that the appellant failed to disclose particulars of the deceased's wife and children in the plaint and only did so during the hearing. He relied on **Alpha Plus Western Kenya & Another v Mary Anyango Kadenge & another** [2015] eKLR.

14. According to the respondent, the appellant is not entitled to damages for loss of dependency as brothers are not beneficiaries of the deceased's estate. He relied on section 4 of the Fatal Accidents Act and **Alpha Plus Western Kenya & Another v Mary Anyango Kadenge & another** (Supra) to support his argument.

15. On pain and suffering, the respondent submitted that an award of Kshs. 10,000/= would be sufficient as the deceased died on the spot. He relied on **Benedita Wanjiku Kimani v Changwon Cheboi & Another** [2013] eKLR and **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another** [2017] eKLR.

16. Regarding who should bear the costs of the appeal, he submitted that given that the trial magistrate did not err, he should be awarded costs. However, if both parties succeed then both parties should bear their own costs. He prayed that the appeal be dismissed.

17. I have considered this appeal, submissions by parties and the decisions relied on. I have also gone through the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

18. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held that:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.

19. In Nkube v Nyamiro [1983] KLR 403, it was held:

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

20. The appellant, the deceased's brother, testified that the deceased died aged 51 years in a road accident. He was a businessman selling clothes in Isinya and made Kshs. 40,000/= per month. He admitted that he had no documents and did not know if the business was registered. According to the appellant, the deceased left behind other brothers Richard Wambua and Joseph Mutisya Wambua. He told the court that the deceased had no family since he had parted ways with his wife who left with their two daughters two years before the deceased's death. He also told the court that he did not know their whereabouts. He stated that it was him who depended on the deceased. He also confirmed that the deceased died on the spot. According to the appellant Joseph Mutisya worked as a watchman while he and Richard were masons. He produced a limited grant of Letters of administration, Death Certificate, Police abstract, copy of records for the vehicle and receipt, Chief's letter, receipt for funeral expenses, statutory notice, and demand letter as Exhibits 1 to 8 in support of his case.

21. The Respondent did not call evidence.

22. I have read the trial court's judgment dismissing the appellant's suit and the appellant's grounds of appeal. The appellant faulted the trial court for dismissing his suit despite the fact that parties had recorded consent judgment on liability. He also complained that even though he had brought the suit under both the Law Reform and the Fatal Accidents Acts, the trial court did not award the estate damages under the Law Reform Act following the consent judgment on liability. The respondent on his part maintained that the trial court did not commit any error of law or fact and, therefore, this appeal should be dismissed.

23. I have considered the respective parties' arguments in this appeal and perused the pleadings. The appellant filed the suit as the legal representative of the deceased's estate. He brought the suit under both The Law Reform Act and the Fatal Accidents Act. In the course of proceedings, parties recorded consent judgment on liability at 70% against the respondent. The deceased was to shoulder 30% liability.

24. The court then went on to receive evidence for purposes of determining the issue of quantum of damages. Only the appellant testified and produced documents as exhibits. These included a copy of letters of administration, receipts for funeral expenses, search for copy of records and police abstract, which were admitted by consent of counsel for the parties.

25. After considering the evidence before it, the trial court dismissed the appellant's case, stating:

I have considered the evidence and submissions by court(sic). Liability is settled at 70 to 30 in favour of the plaintiff. Though it is submitted for the plaintiff that the deceased was aged 51, was unmarried and was survived by the plaintiff and another brother, it came out during cross-examination of the plaintiff that the deceased had two daughters. Looking at the letter from the chief...it gives the surviving beneficiaries as Joseph Mutisya Wambua, Peter Ngwili Wambua, Michael Maluki Wambua. This contradicts the plaintiff's own evidence on survivors. These are the people who have unconditional and unfettered right to the estate of the deceased as primary beneficiaries who have not been disclosed.

26. The trial court then went on to state that it was not sure whether the people claiming for the estate were genuine. Referring to section 8 of the Fatal Accidents Act, the trial court stated that its role was to uphold substantive justice and, for that reason, it had to dismiss the suit.

27. It is clear from its judgment that the trial court failed to consider, first; that there was already consent judgment on liability and the only issue before it was that of assessment of damages. Second, the appellant had filed the suit as the legal representative of the deceased's estate. One of the documents produced by consent, was a copy of letters of administration issued to the appellant on 13th May 2019 as the legal representative of the deceased's estate. Section 3 of the Law of Succession Act Cap 160 defines "**personal representative**" to mean "**the executor or administrator, as the case may be, of a deceased person.**" The same section defines "**Administrator**" to mean "**a person to whom a grant of letters of administration has been made under this Act.**"

28. The grant of representation was issued to the appellant by a court of competent jurisdiction and had not been challenged. The trial court had no legal basis, therefore, for holding that the suit was not filed by the proper persons. Only the personal representative of the deceased, whether widow, child, brother or relative, could claim on behalf of the estate. The trial court fell into error by dismissing a suit properly filed by the personal representative of the deceased's estate.

29. More importantly, parties having recorded a consent judgment on liability, the trial court's only duty was to assess damages under the Law Reform Act and the Fatal Accidents Act. Under the Law Reform Act, damages awardable are for pain and suffering and loss of expectation of life. The appellant having filed the suit as the deceased's personal representative and there being a consent judgment on liability, the trial court again fell into error and had no justifiable reason for not assess damages under these heads.

30. Under the Fatal Accidents Act, the trial court had to determine whether the appellant had proved dependency and, if so, assess damages; if not, dismiss the claim under that head. The trial court similarly failed to make a determination on whether or not the appellant proved

dependency under the Fatal Accidents Act. The trial court was also in error for not determining the issue of special damages.

31. Having held that the trial court was in error in dismissing the appellant's suit, I now turn to consider the issue of quantum of damages and special damages.

Quantum of damages

32. The trial court held that had it been properly approached by the deceased's estate, it would have awarded Kshs. 150,000/= under the head of pain and suffering. The trial court did not however cite any decisions or give reasons for such an award. In his submissions before the trial court, the appellant proposed Kshs. 200,000 under this head. He cited EMK v OO [2018] eKLR where Kshs. 100,000 was awarded for pain and suffering and Kshs. 150,000 for loss of expectation of life. He also cited Mwita Nyamohanga & another v Mary Robi Moherai (supra) where again Kshs. 100,000 was awarded for pain and suffering and Kshs. 100,000 for loss of expectation of life in 2019 and Simon & Stephen Onsumu Kibage v Rebeka Mwangi & Another [2017] eKLR where Kshs. 20,000 was awarded for pain and suffering and Kshs. 100,000 for loss of expectation of life in 2017.

33. The respondent suggested Kshs. 10,000 for pain and suffering. He cited Benedeta Wanjiku Kimani v Changwon Cheboi & another. He also cited Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & Another where Kshs. 10,000 was awarded for pain and suffering. He also suggested Kshs. 100,000 for loss of expectation of life.

34. Before this court, the appellant urged for Kshs. 100,000 for pain and suffering and Kshs. 250,000 for loss of expectation of life. On his part, the respondent suggested Kshs. 10,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life.

Pain and suffering

35. I have considered parties' submission on the awards under the Law Reform Act, namely; pain and suffering and loss of expectation of life. An award for pain and suffering is meant to compensate a person for the pain endured. In the case of a deceased, the pain endured before death. Pain suffered is therefore a matter of fact and the party claiming under this head must demonstrate through evidence, that the person/deceased endured Pain before the court can award damages under this head. The amount to be awarded will depend on the length of time the deceased went through pain before death.

36. There was no evidence from the appellant how long the deceased suffered before he died. The respondent contended that the deceased died on the spot which the appellant did not dispute. According to the plaint, the accident occurred on 5th April 2016 and the death Certificate which was produced as an exhibit, shows that the deceased died on the same day 5th April 2016.

37. Taking into account the fact that the deceased died on the spot and the current awards on the issue where death is instant, an award of Kshs. 20,000 would be fair and reasonable for pain and suffering. (See Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR; Florence Awour Owuoth v Paul Jackton Ombayo [2020] eKLR where Kshs. 10,000 was awarded in 2018 and 2020.

Loss of expectation of life

38. Under the head of loss of expectation of life, the trial court stated that it would have awarded Kshs. 100,000 again without giving reason or citing decisions to back her up. Taking into account recent awards under this head as cited by the parties, I am of the considered view that an award of Kshs. 100,000 would be reasonable. (See also Gilbert Kimatare Nairi & Another (Suing as personal representatives of the estate of Lemayian Richard Kimatare(Deceased) v Civiscope Limited HCCA No 13 of 2020 (unreported).

Loss of dependency

39. The appellant also urged this court to award damages under the Fatal Accidents Act. Section 4 of the Act states that an action brought by virtue of the provisions on the Act should be for the benefit of the wife, husband, parent and child of the person whose death was so caused. The appellant is not one among those on whose behalf a suit may be brought under this Act. In other words, the appellant did not show that he and his brothers were dependants of the deceased.

40. It was sated during the hearing that the deceased's wife and children deserted him two years before his death. The trial court and even this court could not tell for certain who these people are. Their names and whereabouts remain unknown. For that reason, the appellant did not prove dependency or that he or his brothers deserved an award under this head. The claim for loss of dependency must, therefore, fail.

Special damages

41. The appellant claimed also special damages of Kshs. 166,840. According to the plaint, the appellant pleaded special damages of Kshs. 155,000 for funeral expenses, Kshs. 140 for death certificate; Kshs 550 for copy of records; Kshs. 1,150 for letters of administration and Kshs. 10,000 for witness expenses. the trial court stated that Kshs. 141, 550 had been proved and would award it.

42. The final awards are as follows;

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

c. Special damages	Kshs 141,550
Total	Kshs. 261, 550
Less 30% contribution	Kshs. 78,465
Net award	Kshs 183, 085

43. In the end, this appeal is allowed and the judgment and decree of the trial court dated 21st May, 2020 set aside. In place therefore, judgment is hereby entered for the appellant for Kshs. 183,085. The appellant shall also have costs of the suit before the trial court and interest at court rates, plus costs in this appeal.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE 2021

E C MWITA

JUDGE