



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 68 OF 2018**

EVERETT WAFULA SITUMA.....1<sup>ST</sup> APPELLANT

COUNTY GOVERNMENT OF BUNGOMA.....2<sup>ND</sup> APPELLANT

VERSUS

WELLINGTON NYONGESA &

FRIDAH KHAOMA NYOGESA (Suing as administrators of the estate of

ASHLYNE ZIPORA NELIMA Deceased).....RESPONDENT

**(Being an appeal from the judgement and Decree of Hon. C. Menya R.M**

**in Kimilili SPMCC No. 44/2016 delivered on 17/10/2018)**

**J U D G E M E N T**

**By a plaint dated 14<sup>th</sup> April, 2016, the plaintiffs (respondents herein) sued the appellants seeking damages under the Fatal Accidents Act, Law Reform Act, special damages, costs of the suit and interest.**

The claim emanates from a road accident on 26/8/2015 which occurred along the Sikata –Kimilili road at Nalondo Market involving Motor Vehicle Registration Number KBV 316K and the deceased pedestrian. The 1<sup>st</sup> appellant was sued in his capacity as the driver and the 2<sup>nd</sup> appellant the beneficial owner. **Ashlyne Zipora Nelima** aged 5 years died as a result.

Briefly the evidence in the trial court was that **PW-1 Fridah Nyongesa** testified that her granddaughter was knocked on 26/8/2015 at Nalondo Market. She stated she did not witness the accident as she was not at the scene. That the deceased used to assist her with house chores.

**PW2 Primas Wambaya** testified that he was a Boda Boda operator at Nalondo Market. On the 26/8/2015, a convoy of 3 vehicles belonging to Governor Lusaka approached at high speed along Bokoli-Kimilili road. That the deceased was standing by the road outside the tarmac when the vehicle hit her while avoiding a pothole.

**PW3 PC Cleophas Juma**, produced the abstract showing the accident involved Motor Vehicle Registration Number KBV 316K Toyota Land Cruiser Prado and the deceased pedestrian. That the file was forwarded to the ODPP Bungoma for inquest and the police file closed. The defence never called any witness. The trial court entered judgment awarded damages as follows;

Liability	100%
Pain and suffering-	Kshs 10,000/=
Loss of expectation of life-	Kshs 100,000/=
Loss of dependency/lost years-	Kshs 1, 000,000/=
Special Damages-	Kshs 81,700/=

TOTAL

Kshs 1, 191, 700/=

Dissatisfied by the award, the appellant appealed to this court on the following grounds:-

- 1. That honourable Magistrate misapprehended the applicable law in the matter thereby arriving at an erroneous decision on loss of dependency hence making an award of damages under loss of dependency in favour of the respondent contrary to the express statutory stipulations under Section 4 of the Fatal Accidents Act.**
- 2. That the honourable magistrate misapprehended the applicable law in the matter thereby arriving at an erroneous decision on special damages in favour of the respondent contrary to express statutory stipulations under Section 19 of the Stamp Duty Act.**
- 3. The honourable magistrate erred in law and fact by proceeding to pronounce judgement in favour of the respondent in total disregard of the appellant's submissions.**
- 4. The honourable magistrate erred in law and fact by taking into account irrelevant and extraneous factors leading to an excessive award to the respondent under special damages.**
- 5. The honourable magistrate erred in fact and law by awarding both damages under the Law Reform Act and under the Fatal Accidents Act.**
- 6. The honourable magistrate erred in fact in failing to take into account the authorities cited on behalf of the appellants with regard to damages awardable to the respondent.**
- 7. The honourable magistrate erred in fact and in law in disregarding the appellant's submissions on quantum and applied the wrong principles of law, that is, by failing to consider the pertinent issues raised in the appellant's submissions.**

By consent the appeal was canvassed by way of written submissions. Counsel for both parties filed their respective submissions.

In their submissions, the appellants condensed the grounds into 2 and submitted on grounds 1 and 2 only. On ground 1, it is submitted that since the respondents are grandmother and grandfather respectively to the deceased, the provisions of section 4 of the Fatal Accidents Act only applies to wife, husband, parent and child of the person whose death was so caused. That the respondents are therefore not dependants within the meaning of Section 4(1) of the Act. Counsel has relied on the decision in *Mary Nabwire Omalla Vs David Wachira & 2 others (2011)eKLR*.

On ground 2, relying on *Ndegwa Kamau t/a Side View Garage vs Fredrick Kalumbo (2017)eKLR*, the appellants submit that the respondents are only entitled to what they have specifically pleaded and proved.

It is further submitted that the receipts tendered in support of funeral expenses do not meet the requirements of section 19 of the stamp duty act since no stamp was attached to the said receipts and should therefore be disregarded. Reliance has been placed on the holding in *Diamond Trust Bank Kenya Ltd Vs Jaswinder Singh Enterprises*. CA no. 285/1998(UR).

The respondent on their part raised the following issues for determination.

- 1. Whether or not the trial court erred in law and consequently arrived at an erroneous decision by making an award under loss of dependency in favour of the respondents contrary to the express statutory stipulations as envisaged by section 4 of the fatal accidents act.*
- 2. Whether or not the trial court erred in law and consequently arrived at an erroneous decision by making an award under special damages in favour of the respondents contrary to the express statutory stipulations as envisaged by Section 19 of the Stamp Duty Act.*
- 3. Whether or not the trial court erred in law and consequently arrived at an erroneous decision in favour of the respondents by making an award under both the law reform act and fatal accidents act.*
- 4. Costs of this appeal.*

On the first issue, counsel citing the provisions of Section 2(1) of the Fatal Accidents Act submits that the respondents are entitled to the damages sought. That since the heading of loss of dependency/lost years was not specific relating to the law under which it was awarded but nonetheless led to the correct result.

That under the Law Reform Act, the suit is brought for the benefit of the estate so that any person may institute the suit on behalf of the estate and therefore the respondent would still have locus under the Law Reform Act. Reliance has been placed in the case of *Roman Karl Hintz Vs Mwang'ombe Mwakima (1984)eKLR*.

On the 2<sup>nd</sup> issue, counsel submits that the appellants never objected to the production of the receipts and are therefore estopped on appeal from raising the same as the same is an afterthought. Counsel for Respondent further submits that the receipts are not tendered by a collector for the recovery of stamp duty as envisaged in the provisions. They are only tendered to prove funeral expenses which constitute expenses

incurred and of which are recoverable under the suit. The case of *Katheri Dairy Co-op. Society & Anor Vs M'mareta M'guatu (2014) eKLR* has been cited in support of this proposition.

On the third issue counsel submits that since the suit was brought under the provisions of the Law Reform Act and the Fatal Accidents Act, there is no law barring the award of damages under the head of pain and suffering as well as loss of expectation. That there was no double compensation. Counsel has relied on the authority in *Ireri Moses Vs Peter Mutugi Muthike (Suing as the legal administrator of the estate of Mary Njeri Muthike-Deceased) (2019)eKLR*

This being a first appeal, this court is guided by the principles set in *Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR*, where the court restated the duty of an appellate court as follows:

***“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....***

From the evidence on record and the parties' submissions, the issue to be determined by this court revolves around whether the subordinate court erred in awarding damages in contravention of the provisions the Fatal Accidents Act and whether the award of special damages can be faulted.

The appellants contend that the trial magistrate awarded damages under the Fatal Accidents Act in express contravention of the provisions of Section thereto. Counsel submits that the class of person entitled to an award under Section 4 is limited to wife, husband, parent and child.

That the respondents are grandfather and grandmother respectively and therefore not entitled pursuant to those provisions.

The respondents on their part contend that the provisions of Section 2 of the Act is wide enough to cover the grand parents as in this case.

Section 2 (1) of the Fatal Accidents Act Cap 32 provides;

***“child” means a son, daughter, grandson, granddaughter, stepson or stepdaughter;***

***“parent” means a father, mother, grandfather, grandmother, stepfather or stepmother.***

As regards the contention that the child was abandoned at PW1's home, Sub Section 2 provides;

***For the purposes of this section a person shall be deemed to be the child or parent of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption; and accordingly in deducing any relationship which under the provisions of this section is included within the meaning of the expressions “child” and “parent”, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.***

From the above provisions; it is clear that the respondents claim before the trial was proper and properly anchored in law.

The authority in *Mary Nabwire Wanyama (supra)* cited by the appellants is not relevant in the circumstances.

On the submission on admissible of receipts in proof of special damages, the appellants fault the trial magistrate for admitting and awarding under that head despite stamp duty not being affixed on them. Addressing the issue under Section 19 of the Stamp Duty Act, Emukule J. in the case of *Benedeta Wanjiku Kimani v Changwony Cheboi & another [2013] eKLR* held;

***I have indeed looked at the invoices, and receipts, and they indeed do not appear to bear any copy of a revenue stamp affixed to them. That does not however conclusively determine that the Plaintiff did not pay for the various services rendered in the course of the deceased's hospitalisation, or for his funeral expenses.***

***In my view it is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed them. Lastly having admitted the receipts by consent, the Defendant's counsel is estopped from challenging their admission by way of submission.***

In the instant case, the receipts forming special damages were produced as Pexh 9(a)-(f). Neither no objection on their admissibility raised by the appellants, nor was it raised in the submissions in the subordinate court and cannot therefore be raised in this court.

Having found as above, I find no merit in the appeal which is hereby dismissed with costs to the respondent.

**DATED AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.**

**S N RIECHI**

**JUDGE**