



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 79 OF 2018

BETWEEN

JOHN MUNGAI KARIUKI & JANE NJERI MBURU (suing as legal representative of the estate of

FRANCIS MUCHIRI KARIUKI (DECEASED).....APPELLANT

AND

KAIBEI KANGAI NDETHIU.....1ST RESPONDENT

SAMUEL KAMAU.....2ND RESPONDENT

JACKSON WATHIGO.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.J. Kituku, SPM

dated 6th April 2016 at Kiambu Magistrates Court in Civil Case No. 277 of 2014)

JUDGMENT

1. The deceased, represented by the appellants, was a pedestrian walking along the Ruiru – Kiambu road on 9th June 2014, when the 3rd respondent’s motor vehicle registration number KAY 427X driven by the 1st respondent veered off the road. It hit him causing him to suffer fatal injuries. The appellants filed a suit against the respondents claiming damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** and **Kshs. 57,500.00** for special damages.

2. The issue of liability was ultimately settled by consent in the ratio 70:30 against the respondents. The trial magistrate was left to assess damages and by judgment dated 6th April 2014, made the following award in the appellants favour:

Pain and Suffering	Kshs. 30,000.00
Loss of expectation of life	Kshs. 120,000.00
Loss of Dependency	Kshs. Nil
Special Damages	Kshs. 26,770.00
	Kshs. 176,770.00
Less Contribution	(Kshs. 53,031.00)
NET TOTAL	Kshs. 123,739.00

3. It is the aforesaid award that has precipitated this appeal. The grounds of appeal are set out in the memorandum of appeal dated 25th April 2016. In summary, the grounds are that the trial magistrate erred in failing to award the appellants damages for lost years under the ***Law Reform Act***. That the trial magistrate failed to award damages under the ***Fatal Accidents Act***. The appellants complained that the trial

magistrate failed to consider its the evidence which was not challenged by the respondent. The appellants therefore prayed that the appeal be allowed and that they be “*awarded damages for Lost Years and/or Loss of Dependency.*”

4. Both parties agreed to canvass the appeal by way of written submissions which I have reviewed. The issue raised in this appeal is whether the trial magistrate ought to have made an award for loss of dependency under the **Fatal Accident Act** or for lost years under the **Law Reform Act**.

5. In considering the claim under loss of dependency under the **Fatal Accidents Act**, the trial magistrate held as follows:

As pleaded in paragraph 1 of the plaint; the plaintiffs are brother and sister to the deceased. They are described as dependants in paragraph (a) of the plaint. Section 4 of the Fatal Accidents Act, Cap 32 states that the claim under this heading can only be brought for the benefit of (the) wife, husband, parents or child of the person whose death was so caused. In this case, brother and sister cannot lay claim as dependants.

I agree with the defendant’s submissions and make no award under this heading.

6. The sum of the appellants’ submissions was that the loss of dependency was proved. Counsel for the appellant submitted that the testimony of Jane Njeri Mburu (PW 1) was that the deceased was the first born and that he used to support their deceased parents and his siblings which the court failed to consider. Counsel cited the case of **Kenya Breweries Limited v Saro [1981] KLR 408** and **Hassan v Nathan Mwangi Kamau Transporter and Others [1986] 457** where the Court of Appeal held that in an African society, it was expected that the children would assist in supporting their parents.

7. Counsel for the appellants further submitted that the trial court failed to acknowledge and give due regard to its submissions in the judgment whereas PW 1 had testified that the deceased provided for his late parents and siblings being the first born and that indeed deems the brothers and sisters as dependants of a deceased person. The appellants argued that in the African culture, well to do siblings are expected to support their less economically endowed family members. Counsel urged the court to re-evaluate the evidence and find that the appellants proved loss of dependency.

8. The respondents supported the decision of the trial magistrate. Their counsel submitted that the wording and spirit of **section 4** of the **Fatal Accidents Act** which the trial magistrate relied on, is not in doubt and was not in need of any novel interpretation as the appellants suggest. In any case, counsel urged, that it was not in dispute, as pleaded by the appellants, that the persons named as dependents were siblings of the deceased hence excluded as dependants under the **Fatal Accidents Act**.

9. The appellants’ case, as pleaded, was on the basis of the **Fatal Accidents Act** and in the plaint they claimed damages for loss of dependency. In accordance with **section 8** of the **Act**, they gave the following particulars;

The deceased was aged 48 years and in good health at the time of his death He was a casual labourer earning Kshs. 15,000/= per month, 2/3 of which went to the plaintiffs and other family members for their upkeep. He abstained from alcohol and tobacco and could have lived longer. His life has been cut short. The deceased is survived by the following dependants:-

1. JOHN MUNGAI KARIUKI - brother (adult)

2. JANE NJERI MBURU – sister (adult)

10. Further and in the submissions before the trial court, the appellant made extensive submissions under the heading of loss of dependency leaving no doubt that the appellants’ claim was made under the **Fatal Accidents Act**. Since the appellants had clearly elected to make a claim for loss of dependency under the **Fatal Accidents Act**, it was not open to the trial magistrate to award the appellants damages for lost years under the **Law Reform Act** as parties are bound by their pleadings.

11. At this stage, it is important to point out that a claim for loss of dependency under the **Fatal Accidents Act** is separate and distinct from a claim of lost years under the **Law Reform Act** although the principles for assessment may be similar and the beneficiaries may, at the end of the day, be the same. The **Fatal Accidents Act** was enacted to provide a statutory cause of action for the benefit of a specific and named class of persons who were dependent of the deceased prior to his death at the hands of the tortfeasor. The **Law Reform Act** was enacted to provide for survival of a certain causes of action upon death of the deceased and thus enable the estate of a deceased person to sue for damages. Where the beneficiaries are the same under both statutes, the courts have held that the damages under one statute must be taken into account when making an award under the other statute (see **Kemfro v A. M. Lubia and Another [1982 – 88] KAR 727** and **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**).

12. Back to the issue at hand, the appellants elected to make their case under the **Fatal Accidents Act** which at **section 4(1)** states;

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 and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased. Even in the cases relied on by the appellant, the principle that in African culture children are expected to support their parents is supported by the words of the statute as the deceased parents are named a dependants.

13. In dealing with the issue of quantum of damages, the applicable principle is that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see *Butt v Khan* [1981] KLR 349).

14. For the reasons I have set out above, the trial magistrate did not err in failing to award damages for loss of dependency and for lost years as urged by the appellants.

15. The appeal is therefore dismissed with costs to the respondents.

DATED and DELIVERED at NAIROBI this 29th day of MAY 2020.

D.S. MAJANJA

JUDGE

Shem Kebongo and Company Advocates for the appellants.

Kairu and McCourt Advocates for the respondents.