REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 111 OF 2008

ACHUNA CHROMBEIYE.....1ST APPELLANT

LOCHAB BROTHERS LIMITED.....2ND APPELLANT

VERSUS

MOSES SHIVACHI..... RESPONDENT

(An Appeal arising out of the Decree and Judgment of Hon. W. N. Njage Principal Magistrate issued

on 25th September 2008 in Eldoret Chief Magistrate's Court Civil Case No. 1190 of 2002

Moses Shivachi vs Achuna Chrombeiye & Lochab Brothers Limited)

JUDGMENT

The Appellants were the Defendants and the Respondent the Plaintiff in the original trial in **Eldoret Chief Magistrate's Court Civil Case No. 1190 of 2002**. The Respondent instituted the said suit in the trial court for general and special damages arising from a fatal accident involving motor vehicle registration number KXK 927 – ZA 7279 which was being driven by the 1st Appellant and owned by the 2nd Appellant. The Respondent sued in his capacity as the legal representative of Harun Nandiema Lulenyo (deceased) for damages for the benefit of his estate under the ***Law Reform Act (Cap 26)*** and for the benefit of his family under the ***Fatal Accidents Act, Chapter 32*** Laws of Kenya. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants. The Respondent relied, *inter-alia*, on the doctrine of *res ipsa loquitor*. The trial magistrate in a judgment delivered on 25th September 2008 held that the Respondent was able to prove that the Appellants were 100% liable for the accident. The trial court awarded the Respondent general damages amounting to Ksh. 480,000/- and special damages amounting to Ksh.10,000/- as well as costs of the suit .

The Appellants, being dissatisfied with the said judgment, filed an appeal against the same. They raised several grounds challenging both liability and quantum. The Appellants faulted the trial magistrate for finding that the Respondent was the personal representative of the estate of the deceased. They complained that the same was not pleaded in the Respondent's pleadings. The Appellants took issue with the trial court's holding that the Respondent had a claim under the ***Law Reform Act (Cap 26)*** and the ***Fatal Accidents Act (Cap 32)***. They were aggrieved with the trial magistrate's holding that the Appellants were liable for the accident that was despite lack of evidence to support the same. They asserted that none of the Respondent's witnesses saw the occurrence of the accident. They faulted the trial magistrate for failing to appreciate that the 1st Appellant was acquitted in **Eldoret Chief Magistrate's Court Traffic Case No. 5351 of 1987**. The Appellants pointed out that the deceased was not married. They faulted the trial magistrate's holding that the deceased's income amounted to Ksh.3,000/- per month, without sufficient proof in that regard. They were aggrieved that the trial magistrate awarded damages that were excessive and based on the wrong principles of the law.

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During the hearing of the appeal, the Appellants submitted that none of the Respondent's witnesses testified in regard to the occurrence of the alleged accident. None of the said witnesses witnessed the alleged accident. The Appellants argued that the particulars of negligence as pleaded were not proved. They maintained that the 1st Appellant was acquitted of the offence of **causing death by dangerous driving** in **Eldoret Chief Magistrate's Court Traffic Case No. 5351 of 1987**. The said traffic suit was founded on the accident that is the subject of the present appeal. They averred that this, in itself, proved that the Appellants were not liable in negligence in the present case. They submitted that **Section 47A** of the **Evidence Act** ought to have accordingly been applied. They were of the view that the Respondent failed to discharge their burden of proof.

With regards to quantum, the Appellants argued that the Respondent was not entitled to any claim under the **Law Reform Act (Cap 26).** They asserted that the Respondent was not a personal representative of the deceased's estate. This is because he failed to avail grant of letters

of administration before the trial court, despite his claim that he had obtained the same. The Appellants submitted that the Respondent failed to give full particulars of the damages he sought under the **Fatal Accident Act**. They argued that the Respondent indicated that the deceased had two dependants in his pleadings; his wife, Beatrice Iminza and his mother, Martha Afande. The Appellants averred that no evidence was availed to prove that the said Beatrice Iminza was the wife to the deceased. They argued that the Respondent admitted that the deceased's mother had died. Therefore no proof of dependency was provided to the court. They faulted the trial magistrate for applying a dependency ratio of $^{2}/_{3}$, and awarding damages to that extent.

The Appellants further submitted that no proof of the deceased's earnings was availed by the Respondent. They maintained that the trial magistrate erred in finding that the deceased earned Ksh.3,000/- per month when the same was not proved.

The Respondent while opposing the appeal, stated that he had acquired the grant of letters of administration for the estate of the deceased. He argued that he therefore had *locus standi* to institute this suit as a personal representative of the estate of the deceased. The Respondent asserted that the deceased was hit while on his lawful lane. He averred that the 1st Appellant was not licensed to drive the motor vehicle subject matter in this suit. He was of the view that in the absence of any explanation by the Appellants, the suit was proved to the required standard of proof on a balance of probabilities.

On quantum, the Respondent maintained that the deceased was working as a casual labourer at Kenya Co-operative Creameries. He was also a self-employed photographer. He asserted that the deceased earned Ksh.12,000/- per month. He was of the view that, due to lack of proof of earnings, the trial magistrate was not misdirected in adopting a conventional figure of Ksh.3,000/- as the deceased's monthly earnings. He submitted that this was a reasonable figure for a casual employee under the circumstances. The Respondent argued that the deceased was married with two children. The deceased's mother was also dependent on the deceased. He maintained that the dependency ratio of $^{2}/_{3}$ adopted by the trial court should not be disturbed. He added that the deceased was 22 years at the time of death. Therefore, the multiplier of 20 years was reasonable in the circumstances. He asserted that the judgment on quantum should be upheld and that the appeal ought to be dismissed with costs.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.)**

In the present appeal, the issues for determination are:

1. Whether the Respondent had *locus standi* to institute the suit in the trial court;

2. If the Respondent did have *locus standi*, whether he proved that the Appellants were to blame for the accident;

3. And lastly, if the second issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment for purposes of compensation.

The Appellants, in their grounds of appeal as well as submissions, averred that the Respondent lacked the *locus standi* to commence, originate or maintain the suit. They argued that the Respondent failed to avail grant of letters of administration as the administrator of the estate of the deceased. He could therefore not claim to be the personal representative of the estate of the deceased. As such, he lacked capacity to institute the suit in the trial court.

The **Law of Succession Act** defines who a personal representative is. **Section 3** of the said **Act** provides that a personal representative means the executor or administrator of a deceased person. The Respondent in his amended plaint filed on 14th February 1996, pleaded that he instituted this suit in his capacity as the brother and personal representative of the estate of the deceased. The Respondent testified that he had obtained grant of letters of administration for the estate of the deceased from the High Court. However, he failed to produce the same in court. His claim that he was a personal representative of the estate of the deceased can therefore not stand.

The Respondent instituted the suit for and on behalf of the dependants of the deceased under the **Law Reform Act** and **Fatal Accidents Act**. Under the **Fatal Accidents Act,** it is not a requirement to obtain letters of administration before instituting a suit. **Section 7** of the said **Act** allows a suit to be instituted by any person, other than an administrator or executor, for and on behalf of the persons envisaged under **Section 4** of the said **Act**. Only a claim under the **Law Reform Act** requires one to obtain grant of letters of administration. This position was upheld in **Troustik Union International & Another vs. Mbeya and Another Civil Appeal No. 145 of 1990, *(unreported)***. In this appeal the Respondent had filed a suit without any grant of Letters of Administration. The Court of Appeal held that the Grant of Letters of Administration were only a pre-requisite to commence an action for the benefit of the deceased estate under the **Law Reform Act.** The court went ahead to affirm the damages awarded to the Respondents therein under the **Fatal Accident Act**. The trial magistrate in the present appeal was therefore not misdirected in dismissing the Respondent's claim under the **Law Reform Act**, while allowing his claim under the **Fatal Accidents Act**.

Having found that the Respondent had *locus standi* to bring a claim only under the Fatal Accidents Act; *did the Respondent* *prove that the Appellants were to blame for the accident?* It is not disputed that an accident involving the Respondent and motor vehicle registration number KXK 927 – ZA 7279 occurred on the date and place stated in the plaint. It is also not disputed that the motor vehicle was owned by the 2nd Appellant and was being driven by the 1st Appellant. However the Appellants are disputing that they were liable in negligence for the said accident.

The Respondent testified that he did not witness the accident. He visited the scene of the accident after he was informed that

his brother had been knocked down by a vehicle. He stated that he found the deceased's body on the scene of the accident. The deceased had died on the spot. The Appellants' vehicle was also on the scene. He produced the police abstract in court. According to the police abstract, the 1st Appellant was to blame for the accident. PW2 and PW3 on cross examination by counsel for the Appellants also confirmed that they did not witness the accident. PW4 confirmed that the deceased died on the material day. The Appellants did not adduce any evidence on their part.

The 1st Appellant was charged in Eldoret Chief Magistrate's Court Traffic Case No. 5351 of 1987 for causing death by dangerous driving in relation to the accident subject matter of this suit. He was subsequently acquitted of the said charges under **Section 215** of the **Criminal Procedure Code**. This court has perused the said proceedings. From the testimonies of the two prosecution eye witnesses as well as that of the 1st Appellant, this court notes that the 1st Appellant was indeed driving the said lorry. He did hit the deceased person. The deceased died on the spot. It should be noted that the standard proof in criminal cases is different compared to that in civil proceedings. Whereas in criminal proceedings the standard of proof is proof beyond any reasonable doubt, in civil proceedings, it is proof on a balance of probabilities. The standard of proof in civil cases is therefore much lower. The mere fact that the 1st Appellant was acquitted in the traffic case does not necessarily mean he cannot be held liable in subsequent civil proceedings.

In the present appeal, the Respondent was able to demonstrate that an accident occurred on the 16th February 1987 involving the deceased and motor vehicle registration number KXK 927 – ZA 7279. He produced the police abstract that was issued to him. He was also able to demonstrate that the 1st Appellant was charged with the offence of causing death by dangerous driving. He also showed that the deceased died as a result of the accident. As such, he had a case against the Appellants. The Appellants on the other hand did not tender any evidence of to rebut the Respondent's claim. Even though the Respondent did not witness the occurrence of the said accident, he relied on the doctrine of *res ipsa loquitor*.

The Black's Law Dictionary defines *res Ipsa loquitur* as "***the thing speaks for itself".*** In explanation on application of the doctrine, the Dictionary adds, ***"the doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case".***

In **Nandwa Vs Kenya Kazi Ltd [1988] KLR, 488** the Court of Appeal observed that:-

> ***"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."***

Similarly in **Embu Public Road Services Ltd. –Vs-Riimi [1968] EA 22 the court observed that where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then, the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.**

> **In the present appeal, it is not disputed that the said accident did occur involving the 1st Appellant and the deceased. The motor vehicle in question was owned by the 2nd Appellant. The Respondent claims that the fact of the accident happening speaks for itself. The Appellants on the other hand can only avoid liability by rebutting the Respondent's claims. The Appellants ought to have demonstrated that either there was no negligence on their part, or that the accident occurred due to circumstances beyond their control or due to the contributory negligence on the part of the deceased. The Appellants failed to do so since they did not tender any evidence to rebut the Respondent's case.**

Having made the above observations, this court finds that the Respondent was able to prove on a balance of probability that the Appellants were jointly and severally liable for the accident that occasioned the fatal injuries to the deceased.

With regards to quantum, the law is quite clear as to when an appellate court can interfere with the trial court's exercise of discretion in arriving at quantum of damages. The Court of Appeal in **Butt V Khan [1977] 1 KAR** held as follows;

> ***"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low…."***

In the present appeal, the Respondent can only claim for damages under the **Fatal Accidents Act.** In assessing the damages under this **Act**, the court has to consider the multiplicand, the multiplier and dependency ratio. The Respondent stated that the deceased was working at Kenya Cooperative Creameries (K) (KCC) as a casual labourer. He was also a photographer. PW2 stated that the deceased earned Ksh.300/- a day from KCC. He additionally earned Ksh.7,000/- from his photography. No documentary evidence was availed to establish proof of earnings. In the case of ***Michael Hubert Kloss & Another V David Seroney & 5 others [2009] eKLR,*** the Court of Appeal held that a trial court ought to consider the evidence before it even if it did not include documentary evidence to determine what would reasonably be considered as the deceased's earnings.

The trial court awarded a conventional figure of Ksh.3,000/- per month as reasonable earnings for an unskilled casual worker. This was due to lack of proof of deceased's earnings. The accident happened in the year 1987. According to the **Regulation of Wages and Conditions of Employment Act** applicable at the time, the minimum wage for a casual labourer was Ksh.163/- a day. This amount is comparable to the amount adopted by the trial magistrate. This court therefore holds that the amount awarded by the trial court was reasonable in the present case. The same is upheld.

The trial court adopted a multiplier of 20 years. The same was not appealed against. This court will not interfere with the same. However, for

academic purposes this court of the opinion that the same was reasonable in the circumstances. In the case of ***Julias Mokua Ongera -vs- Esther Njoki Gichari [2006] eKLR,*** the deceased was aged 22 years at the time of his demise. The High Court adopted the multiplier of 20 years. In ***Robina Mabeya & Others -vs- Evanson Ngungi and Another HCCC No. 1409 of 1984 (unreported)*** the court adopted a multiplier of 20 years where the deceased died at the age of 23 years. In the present appeal, the deceased died at the age of twenty two (22) years. The multiplier of 20 years was therefore reasonable in the circumstances.

A dependency ratio of $^{2}/_{3}$ was adopted by the trial magistrate. The Appellant was of the view that a dependency ratio of $^{1}/_{3}$ was reasonable in the circumstances. The Appellant stated that the deceased was not married. In addition, the deceased's mother had died. The Respondent on the other hand submitted that the dependency ratio of $^{2}/_{3}$ was reasonable. He averred that the deceased was married with two children.

PW2 testified that she cohabited with the deceased as his wife from 1983. They had two children. PW1 and PW3 corroborated this oral evidence. The Appellants did not adduce any evidence to the contrary. This court is of the view that oral evidence that is uncontroverted is sufficient to recognize PW2 as a dependant of the deceased. This court therefore holds that PW2 was a dependant of the deceased. The Respondent however failed to plead the deceased's two children in his plaint. The mandatory provisions of **Section 8** of the **Fatal Accidents Act** provide as follows;

> ***"In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered."***

The names of the deceased's children were not included in the particulars set out in the plaint. They can therefore not be considered as dependants for purposes of compensation in the present appeal. The mother of the deceased has since passed away. In the premises therefore, this court holds that a dependency ratio of $^{1}/_{3}$ would be reasonable in the circumstances.

The Respondent was awarded Ksh.10,000/- in special damages for funeral expenses. He did not produce any receipts in support of the pleaded sum. Under ***Section 2*** of the ***Law Reform Act***, a deceased person's estate is entitled to damages for funeral expenses even with the absence of receipts. However, the court has already established in the present appeal that the Respondent is not entitled to a claim under the **Law Reform Act**. In the absence of receipts, the amount awarded as special damages consequently fails. It is trite law that special damages ought to be pleaded and proved. This court therefore sets aside the amount of Ksh.10,000/- awarded as funeral expenses.

The upshot of the foregoing is that the Appellant's appeal succeeds on quantum only to the extent outlined above and this court accordingly enters Judgment for the Appellants as follows:-

Loss of dependency	3,000 x 12 x 20 x $^{1}/_{3}$	KShs.240,000/=
TOTAL AWARD:		**KShs.240,000/=**

Therefore, the sum of Ksh.490,000/- awarded to the Respondent by the trial court as total damages is hereby set aside. The same is substituted with a total award of Ksh.240,000/-. The Respondent will have the costs of the suit in the lower court as well as costs of the appeal. Interest shall accrue at court rates from the date of the judgment of the trial court. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2019

HELLEN OMONDI

JUDGE