



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 56 OF 2014

TOM OLUOCH OLOO(Suing as the administrator and legal Representative of the

Estate of **GEORGE OCHIENG NGOCHE – (Deceased)**.....**APPELLANT**

Versus

AFRICAN SAFARI CLUB.....**RESPONDENT**

J U D G M E N T

1. In the appeal even though the appellant preferred 8 Grounds of Appeal, at the hearing counsel narrowed down the grounds into three as follows:-

- i. Was the appellant the father to the deceased?**
- ii. Was the Appellant entitled to damages under Section 4(1) Fatal Accidents Act?**
- iii. Are damages awardable only upon proof by documents?**

In oral submissions however the appeal was further narrowed down to loss dependency only.

2. The decision appealed from was delivered on the 28/3/2014 upon full trial. In that judgment the trial court found the Respondent wholly to blame then proceeded to award to the Appellant judgments as follows:-

“Under Fatal Accident

A claim for loss of dependency must be proved. From the pleadings the deceased was aged 20 years old and was to pursue a plant mechanic course at Mombasa Polytechnic. The death certificate shows that he was a shopkeeper. I find that the claim for loss of dependency has not been proved and ought to fail due to the following:-

- i. PW 1 testified that the deceased had been selected to join Mombasa Polytechnic but there was no proof of the same. The admission letters from the said institution ought to have been proved in evidence to support this.**
- ii. There was also no evidence proving that the plaintiff was the father to the deceased or that the persons listed at paragraph 7 of the plaint were the deceased mother and siblings. The birth certificates of the deceased siblings or even a letter from the chief of their locality would have sufficed to prove the existence of the relationship. Either way Section 4(1) of the Fatal Accidents Act is clear that an action should be brought for the benefit of the wife, husband, parent and child of the deceased. The deceased siblings are therefore not beneficiaries under the Act.**
- iii. I agree with submissions by the 2nd defendant that a party is bound by its pleadings and in the plaint, it was not pleaded that the deceased was a shop keeper or used to earn Kshs.20,000/= as per the evidence of PW 1. It was pleaded that the deceased was to pursue a course at Mombasa Polytechnic which has also not been proved”.**

3. When counsel attend court to argue the appeal, Mr. Adhiambo in narrowing down the extent of his appeal was recorded to say:-

“This appeal is only upon dependency as we do not take any issue with pains and suffering, loss of expectation of life and

special damages”.

4. The court got the counsel to say that the appellant was only aggrieved with the decision by the trial court in not awarding damages for loss of dependency.
5. In arguing the appeal the counsel cited to court the decision **Esther Nyambura vs Carnus Rashod** where the court held that it is a travesty of justice to ignore oral evidence. Counsel then cited to court the provisions of Section 62 and 84(b) of the Evidence Act for the contention that the relationship between the plaintiff and the deceased was sufficiently proved. For those reasons counsel submitted that Section 4(1) Fatal Accidents Act identified the Appellant as a dependant and that with the evidence on record that the deceased would assist his parents, it was erroneous for the court to dismiss the claim for lost dependency. In conclusion the counsel faulted the court by stating that documents is not the only way to prove damages and referred the court to **Appropriate Technology Health vs Estate of Sella Ayuma [2015] eKLR as well as Sukari Industries vs Daniel Akech Ngulo[2015] eKLR.**
6. For the respondent, submissions were offered opposing the appeal and asserting that the trial court could not be faulted because there was no error demonstrated to have been committed. Counsel submitted that the Appellant ought to have produced a document like letter for the chief to prove being the father to the deceased or atleast a birth certificate.
7. On income by the deceased counsel submitted that there was no evidence led that the deceased was a shopkeeper with any income, the same was never pleaded nor was the allegations that he was to join college to pursue course on plant mechanics proved. He pointed out that the prayer for loss of dependency was disallowed not on account of lack of documents but rather on account of lack of pleadings and proof of the same.

Determination

8. The law is that extent dependency is a matter of fact to be proved by evidence [\[1\]](#) and the burden of proof is upon him who asserts and who would fail if no evidence was led at all.
9. Before the trial court there had been pleaded the fact that the deceased was awaiting to join coll[\[2\]](#)ege and pursue plant mechanics and indeed evidence was led to that effect. However there was no pleading that the deceased ran a shop or that he was a benefactor to the parents and therefore the Appellant was bound not to depart or add to such pleading by leading evidence that the deceased was a shopkeeper.
10. But even if there had been a pleading of such engagement there was no evidence at all that the shop was indeed ran by him. Nothing would have been easy to produce a trade licence or even records of business. I do find that there was no evidence that the deceased was gainfully engaged.
11. In addition while I do agree that there was sufficient evidence on the relationship between appellant and the deceased, I do find that there was no evidence of dependency. What however cannot be disputed is that in African Societies parents expect to be supported by their children when they establish in life and that in that event the court awards nominal damages for the expected dependency [\[3\]](#). But even then such must be pleaded.
12. In the trial before the lower court no such pleading was made and consequently, I do not find the trial court to have committed any error as a trier of facts to entitle this court to interfere with its decision.
13. The upshot is that the appeal fails and is thus dismissed with costs.

Dated and delivered at **Mombasa** this **30th** day of **May 2019**.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Benedetta Wanjiku Kimani vs Changwon Cheboi [2013] eKLR

[\[2\]](#) Sections 107 and 108, Evident Act

[\[3\]](#) Kenya Breweries Ltd vs Saro [1981] KLR 408 and Hassan vs Nathan Mwangi Kamau [1985] KLR 457