



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 201 OF 2016

LUCY NYOKABI MUKURA (Suing as the personal

representative of the Estate of SIMON BARA.....APPELLANT

VERSUS

DAVID MUGO KIHARA.....RESPONDENT

*(Being an appeal from the Judgment of Hon. J. Kituku Principal Magistrate delivered on 23/11/2016 in Kiambu CMCC No. 37 of 2016)*

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

1. This appeal emanates from the judgment of Kituku, Principal Magistrate in Kiambu CMCC No. 37 of 2016. By the plaint filed on 2/02/2016, the Plaintiff in the lower court and now the Appellant herein, brought a suit against the Defendant now the Respondent, in her capacity as the personal representative of the estate of **Simon Bara** (deceased), claiming compensation for the fatal injuries sustained by the deceased on or about 12<sup>th</sup> September, 2014.

2. She averred therein that the deceased was lawfully travelling in motor vehicle registration number **KBX 086Q** along Kiambu-Githunguri road when the Respondent and /or his agent so negligently drove the said motor vehicle that he caused the same to lose control, veer off the road and roll several times and as a result, the deceased sustained fatal injuries.

3. The Respondent filed his Defence Statement denying any liability for the accident. By consent, liability, was subsequently apportioned at 85:15% in favor of the Appellant as against the Respondent. (See CMCC No. 36 of 2016). In his judgment, the trial Magistrate entered judgment as follows:

General damages

a. Law Reform Act-	Nil
b. Fatal Accident Act	Kshs. 521,800/=
c. Special damages	Kshs. 90,000/=
Total	Kshs. 611,800/=
Less 15% contribution	Kshs. 91,770/=
NET	<u>Kshs. 520,030/=</u>

4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present appeal based on the following grounds:-

***“a) That the learned magistrate erred in law and fact in failing to award damages to the Plaintiff for pain and suffering despite the deceased enduring pain for 3 days before his death.***

***b) The Learned Magistrate erred in law and fact in failing to award the Plaintiff damages for loss of expectation of life.***

***c) The Learned Magistrate erred in law and fact in awarding the Plaintiff damages for loss of dependency that was manifestly***

*low by considering the wrong multiplier”.*

5. The court directed that the appeal be canvassed by way of written submissions. In his advocate’s written submissions, the Appellant faulted the court for declining to award damages for pain and suffering. Counsel cited the case of **Benedetta Wanjiku Kimani (suing as the personal administrator of the Estate of Samuel Njenga Ngunjiri Vs Changwen Cheboi & An** where the court awarded Kshs. 100,000/= for pain and suffering. It was submitted that the Appellant having obtained Letters of Administration in Nairobi High Court Succession cause no. 1695 of 2015 ought to have been awarded damages under the Law Reform Act. Lastly, it was contended that the trial court relied on the wrong salary scale that was contrary to the general labourer’s minimum wage of Kshs. 9,024.15 applicable in material period.

6. The Respondent in his written submissions and urged the court to dismiss the appeal. Counsel submitted that the Appellant did not have a full grant of letters of administration and as such lacked legal standing. He cited the case of **Lydia Ntembi Kairanya & ano vs Attorney General (2009) KLR** where it was held that a limited grant of Letters of Administration Ad Litem only authorized the Plaintiff to file suit.

7. The Respondent submitted that the award under the Fatal Accidents Act should have failed as there was no proof of dependency and earnings. He relied on the case of **Caroline Leah Awino vs Stephen Miheso Ahikoyo (2014) KLR and Monica Muthoni Mwangi v Peterson Wanjohi & ano (2004) eKLR**. Counsel urged court not to disturb the award under the Fatal Accident Act or set the award aside as dependency was not proved. In conclusion, the court was urged to uphold the judgment of the trial court and dismiss the appeal with costs.

8. The court has considered the rival submissions and the record of the court below. In **Selle v Associated Motor Boat Co. [1968] EA 123** the Court of Appeal for East Africa laid down the principles guiding the exercise of the jurisdiction of the first appellate court. The court stated:

**“An appeal to this Court from the 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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities or materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan[1955] 22 EACA 270).”**

See also **Peters v Sunday Post Limited (1958) EA 424; Williams Diamonds Limited v Brown (1970) EA. 1.**

9. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

**“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”**

10. In my considered view, the issues raised on this appeal are whether the Appellant was entitled to damages under the Law Reform Act, and secondly, whether the award in respect of lost dependency was inordinately low.

11. On the first question, it seems that the trial court was persuaded, on the authority of **Lydia Ntembi Kairanya and Another v AG (2009) e KLR**, that the grant *ad litem* on whose authority the claim under the Law Reform Act was brought did not suffice. And that the Appellant required a full grant as stated in that authority, to succeed in a claim brought under the Law Reform Act. The grant upon which the Appellant herein relied on was a grant *ad litem* issued under Section 54 of the Laws of Succession Act and the First Schedule.

12. The grant in the form **P & A 47 “A”** was issued on 22<sup>nd</sup> July 2015. It is evident that the Plaintiff in **Lydia Ntembi Karanya** had also obtained what was described as a Limited Grant of Letters of Administration *Ad Litem* in June 2007. The court however did not consider the said grant suitable and adequate for the purpose of filing and prosecuting the suit in that case and held that a full grant was necessary for that purpose.

13. **Kasango J** dealt with a similar issue in **Priscilla Njeri Wamiti And 2 Others v Shiku John Company Ltd [2017] e KLR**. In that case, lower court had dismissed the Appellant’s suit on grounds that the Appellant had no capacity to prosecute the suit as the Limited Grant of Letters of Administration *Ad Litem* was limited to filing but not prosecuting the suit.

14. I associate myself entirely with and will liberally replicate the sentiments of **Kasango J** in that case. The learned Judge observed that:

**On the second issue, the appellants were issued with a limited grant of letters of administration Ad Litem. It was on the basis of that letters of administration that the appellants filed the civil suit seeking compensation for the death of the deceased. The case upon which the trial court relied upon to find that the appellants had no capacity to prosecute that suit, namely LYDIA NTEMBI (supra) which was a High Court decision, is at variance with the Court of appeals decision of 24th October 2013 in the case JOEL MUGA OPIJA – V- EAST AFRICAN SEA FOOD LIMITED [2013] eKLR. From that decision of the court of appeal it is clear that prior to Legal Notice No. 39 of 2002 the Limited grants that were issued were as per Form 47 of the Forms in the Probate And Administration Rules (herein after referred to as the Rules). That Form 47 is granted as provided under Rule 36 (2) of the Rules, which Rule provide for special circumstances of urgency which urgency could not wait for court to make full grant and which provides:**

**“Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.”...**

Legal Notice 39 of 2002 however provided for issuance of letters of Administration *AD Litem*. The Form under which letters of Administration Ad Litem were to be issued is Form (90)B. Under that Form Limited Letters of Administration Ad Litem could be issued for the purpose of filing suit and until further representation were granted by the court.

In the case JOEL MUGA OPIJA (supra) The justices in that case were facing a ground of appeal very similar to the one before me. The ground of appeal they were considering was whether.

*“The Learned Judge of the Superior Court erred in law in holding that appellant herein had no locus standi to file the original suit by rejecting exhibit 5 (Limited Grant of Letters of Administration) When it was expressly endorsed thereon that the said grant was for filing suit.”,*

15. The Judges of Court appeal made the following holding in respect of that ground

*“We will consider the issue of status first. The main reason why the learned Judge sustained the respondent’s arguments on this issue is that the form used and its contents limited the Appellants to “collect, get and receive” the estate and doing such things as may be necessary for the preservation of the same until further presentation be granted. She rightly in our view considered that as a very limited grant which did not authorize the respondent to institute or defend any claims on behalf of the estate of the Deceased. Mr. Okoth responds to that by submitting that at the relevant time when the accident happened that Form P & A 47 was the form used for purposes of instituting and defending claims such as was made in this case. He says that the separate forms now in use came into use much later. The accident took place on 16th June, 2001. That is not in dispute. The deceased died on that same day according to the evidence which includes Certificate of Death produced as exhibit. Section 67 (1) of the Law of Succession was clear that no presentation, other than a limited grant for collection and presentation of assets, could be made until there had been published Notice of the application for the Grant. Form 47 used here was undoubtedly that for limited grant and ideally was not a suitable Form for grant that would authorize a person to sue or to defence a suit on behalf of the estate of a Deceased person. However, Rule 70 of the Probate and Administration Rules states:*

*“The Forms set out in the First Schedule with such adaptations additions and amendments as may be necessary, shall, when appropriate be used in all proceedings under these rules.*

*Provided that the Chief Justice may by Notice in the Gazette vary the forms and prescribe such other or additional forms as he thinks fit.”*

*A look at the first schedule indicates that Form 47 is one of such forms which could be used with variations as appropriate. Thus before the Chief Justice gazette a varied form, applicants could use Form 47 as appropriate for all proceedings under the rules. This continued till Legal Notice No. 39 was introduced under the Probate and Administration (Amendment of the fifth schedule Rules) 2003, and a proper form was introduced. This was long after the death of the Deceased and indeed after the Appellant had applied for Letters of Administration under the old provisions.*

*We think that had the attention of the Learned Judge of the High Court been drawn to the above, and to the fact that the Learned Magistrate had in a ruling allowed the use of form for filing the case, she would have come to the same conclusion she came to in her judgment. We are persuaded that that ground was well taken.”*

*“That decision of the Court of appeal in my view sufficiently responds to Appellants’ ground of appeal on locus standi. A party can where the Limited Grant so authorizes file suit or defend suit on behalf of a deceased person. This is so since Legal Notice No. 39 of 2002 authorised the limited letters of administration Ad Litem to file suit. The appellants had obtained Limited Letters of administration Ad Litem. That letter as per Legal Notice No. 39 of 2002 authorized appellant to file their suit.”*

16. The Court of Appeal endorsed albeit implicitly in that decision, that after the Legal Notice No. 39 of 2003, Form 47 “A” of the first schedule was the grant for use by parties desirous of filing of defending suits on behalf of deceased persons. The Court of Appeal decision in **Joel Muga** in my view leaves no doubt that all that a claimant suing under the Law Reform Act on behalf of a deceased person required to acquire *locus standi* was a limited grant *ad litem* and not a full grant as held in **Lydia Ntembi’s case**. In the circumstances, I am persuaded that the decision of the trial court on that question was erroneous and would allow the first and second grounds of appeal.

17. The trial court had despite the said findings correctly proceeded to assess damages (see handwritten judgment) as follows:

General damages for pain and suffering KShs.100,000/=

General damages for loss of life expectation KShs.100,000/=.

These awards are not disputed and this court having found that the Appellants had *locus standi* to bring the claim under the Law Reform Act also finds that she was entitled to damages under the Law Reform Act.

18. On the question of the award in respect of lost dependency, the Appellant’s complaint is that the trial court having settled on the application of the minimum wage as the multiplicand applied the wrong scale. The Respondent supports the said wage. The deceased died on 13.8.14. Under the Regulation of Wages (General) (Amendment) Order, 2013 (LN No.197 of 2013) different categories of wages are stipulated for cities, municipalities, some town councils and for all other areas.

19. While there was no evidence to prove the deceased's occupation and place of work, the trial court did not give reasons for placing his case in the category of all other areas, which is contained in column 4 of the legal notice schedule. Similarly, there is no evidence to support the Appellant's assertion that the deceased's case fall within column 3 of the schedule which relates to towns and municipalities. It is evident that the parties having recorded a consent on liability left the matter of income to the court's determination based on their submissions. In the circumstances the trial court cannot be faulted for settling on the minimum wage applicable in "all other areas", being the lowest.

This court does not find any reason to fault the lower courts use of KShs.5218/= wage per month as the multiplicand. I find no merit therefore in the 3<sup>rd</sup> ground of appeal.

20. In the result, the appeal has succeeded in respect of grounds 1 and 2 and the court sets aside the finding of the lower court in that regard and enters judgment for the Appellant against the Respondent as follows:

Damages Under the Law Reform Act

General damages for pain

and suffering - KShs.100,000/=

General damages for loss of

expectation of life - KShs.100,000/=

Damages under the Fatal Accident Act

General damages for lost

dependency -  $\text{KShs.5218} \times 25 \times 12 \times ? = 521,800/=$

Gross Total - KShs.721,800/=

21. This sum is in addition to special damages awarded at the trial – KShs. 90,000/= and is subject to the agreed liability ratio of 85:15.

The appellants are awarded half the costs of this appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS 23<sup>RD</sup> DAY OF MAY 2019.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

Appellant – No appearance

Respondent – No appearance

Court Assistant - Kevin