



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 315 OF 2013

CORAM: D.S. MAJANJA J.

BETWEEN

JUDAH GIKUNDA M'BAGINE suing as the legal representative of the estate
of **FRIDAH GACHERI GIKUNDA (DECEASED)**.....**APPELLANT**

AND

ANTONY NYAGA NJAGI**RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. D. O. Onyango, PM dated 12th November 2013 at the Chief Magistrates Court at Meru in Civil Case No. 148 of 2012)

JUDGMENT

1. The deceased, aged 22 years old, sustained fatal injuries while travelling in the respondent's motor vehicle registration number KBJ 987B, along the Meru-Chuka Road on 8th July 2011. The appellant filed suit against the respondent to claim damages on behalf of the estate and dependant under the *Law Reform Act (Chapter 23 of the Laws of Kenya)* and under the *Fatal Accident Act (Chapter 32 of the Laws of Kenya)*. The trial magistrate found the respondent fully liable and awarded damages under the pain and suffering and loss of expectation of life under the *Law Reform Act* and dismissed the claim for loss of dependency under the *Fatal Accidents Act*.
2. The appellant has appealed against the judgment. The thrust of this appeal is that the trial magistrate failed to make an award of damages for loss of dependency under the *Fatal Accidents Act* ("the *FAA*") by holding that the appellant was a brother of the deceased and was therefore not entitled to benefit from the claim under **section 4** of the *FAA* which defined a dependant as "*wife, husband, parent and child.*"
3. In the memorandum of appeal dated 9th December 2013, the appellant contends that the trial magistrate erred by failing to assess general damages under the *FAA* despite sufficient evidence having been adduced that the appellant was the father to the deceased. He stated that the trial magistrate erred by recording that the deceased was a sister to the appellant when she was his daughter and consequently finding that the evidence was inconsistent with the pleadings. He further contended that the trial magistrate erred and failed to find that the appellant pleaded the name of the deceased's mother and therefore the deceased could not be the appellant's sister. The appellant pointed to the succession proceedings which showed that he was the deceased's father and Fridah Kinanu M'Itunga, her mother.
4. In this regard, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusions bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
5. Turning to the issue at the heart of this appeal, that is whether the appellant was the brother or father of the deceased, the relevant part of the proceedings shows as follows:

PW 1 JUDAH GIKUNDA M'BAGINE SWORN AND STATES IN KISWAHILI

I came from Kariene in Meru Central. I am the plaintiff in this case, I knew Fridah Gacheri Gikunda. She was my sister. She did in a road traffic accident

The mother of the deceased was Faith Kinanu.....

XXD BY KIMUTAI

The deceased was my sister. We are 5 siblings. She was the 3rd born. There were 2 younger than her. Our parents are deceased. I was her guardian since nursery. My parents died in 1996 and 1998. My brother have no work. I cultivate coffee. I cannot how much I paid in total. I do not know if the deceased used to get HELB loan. My sister is like my daughter. I pray for compensation from the owner of the motor vehicle.

[Emphasis mine]

6. After analysing the evidence against the plaintiff, which stated at paragraph 5(a) that the deceased's father and mother were Judah Gikunda and Faith Kinanu M'Itunga respectively, the trial magistrate held as follows:

In the amended complaint the plaintiff pleaded in paragraph 5(a) that he and one Faith Kinanu M'Itunga were dependants as they were father and mother respectively of the deceased. In his evidence the plaintiff testified that the deceased was his sister and that Faith Kinanu M'Itunga was the plaintiff's wife (sister in law to the deceased). He went on to state that his parents (also parents of the deceased) had died much earlier. It is clear therefore that the plaintiff's evidence is inconsistent with the pleadings. He has in my view failed to prove that he and his wife were dependants of the deceased. There is absolutely no evidence that the deceased had dependants.

7. Did the magistrate err in reaching the conclusion he did on the basis of the evidence? In order to resolve this issue, I allowed the appellant to admit additional evidence comprising documents he filed ***Meru High Court Succession Cause No 442 of 2011*** to obtain the grant of letters of administration *ad litem* to show that he was the father of the deceased. I admitted the evidence because it was part of the court record supporting the application for the grant and to enable the appellant demonstrate that trial magistrate merely made a mistake in referring to the deceased as the appellant's sister.

8. When considered alongside the appellant's testimony outlined and emphasised above, I do not think that the trial magistrate made a mistake in recording the evidence as contended by the appellant. First, the appellant's capacity to recover damages was a live issue for the respondent and that is why his counsel raised it in cross-examination. In response, the appellant gave lucid answers on his relationship with the deceased. Second, and despite these answers, the appellant's advocate did not re-examine him on the issue. Third, the respondent dealt with the issue of capacity in its written submissions. If the appellant had not made testimony on the nature of the relationship, why would the respondent raise and make submissions on the matter.

9. I am not convinced by the appellant's contention that the trial magistrate made an error in recording the evidence as the tenor of the evidence in chief and the answers in cross-examination do not support such a conclusion. Even assuming that the mistake was in recording the word "sister" instead of "daughter" then the whole testimony I have outlined particularly the answers given by the appellant in cross-examination would not make any sense.

10. Lastly, the appellant in his affidavit sworn in the support of the application for additional evidence deponed at paragraph 5, "*THAT when I testified in MERU-CMCC No. 148 of 2012, I did so in Kimeru Language since I am not conversant with English or Kiswahili Languages.*" This again is not true as the record shows that the appellant testified in Swahili and there is no indication that there was a Kimeru translator. Since the appellant was represented by a lawyer, counsel would have had no difficulty in informing the court of the appellant's preferred language of communication. I therefore find and hold that the reference to "sister" in the proceedings was not a mistake by the trial magistrate.

11. Having appraised the evidence independently as the first appellant court, I find that the appellant testified on oath that the deceased was his daughter. His testimony was inconsistent with what was pleaded that he was a dependant when, in fact, he was not. I therefore find and hold that the trial magistrate, who had the benefit of hearing the witness, came to the correct conclusion and I affirm his decision.

12. For the reasons I have given, I dismiss the appeal with costs of **Kshs. 30,000/-**.

DATED and DELIVERED at MERU this 24th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Kiogora instructed by Kiogora Arithi and Associates Advocates for the appellant.

Mr Nyabuti instructed by Kairu and McCourt Advocates for the respondent.