



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 29 OF 2013

**LIVINGSTONE MWAMBUGU MWAKHUNGO 1ST
APPELLANT**

FRESH "N" JUICY LIMITED 2ND APPELLANT

VERSUS

**SARAH ANYANGO JAOKO (*Suing as the personal representative
of the Estate of Margaret Ojwang Jaoko (deceased)*)RESPONDENT**

**(An appeal from the judgment and decree of the Chief Magistrate's Court of Kenya at
Kisumu Hon. Sala RM (dated the 8th of May 2013 in the Civil Case No. 312 of 2012)**

JUDGMENT

The deceased in this case sustained fatal injuries in a road accident that occurred along the Ahero-Katito Road on 17th March 2012 which involved motor vehicles KAN 096M Toyota Van, in which she was a fare paying passenger, and KBP 707V Mitsubishi lorry belonging to the appellant. Following her death the respondent who is her daughter obtained letters of administration ad litem and lodged a claim for damages under the Law Reform Act and the Fatal Accidents Act.

On 25th September 2012 the Advocates for the parties recorded a consent on liability in the ratio 30:70 in favour of the Plaintiff against the Defendant. The matter then proceeded for assessment of the quantum of damages awardable only. The Court heard evidence of the Administratrix/Respondent but no evidence was tendered by the appellants. Thereafter parties filed written submissions. After considering the evidence tendered by the respondent and the submissions by both sides the Trial Magistrate assessed damages and entered judgment for the respondent against the Appellant as follows:-

<i>"Pain and suffering</i>	- Kshs. 30,000/=
<i>Loss of Expectation of life</i>	- Kshs. 50,000/=
<i>Loss of dependancy</i>	- <u>Kshs.400,000/=</u>
T O T A L	- Kshs.480,000/=

He then proceeded to distribute the award to the 5 children of the deceased named in the plaint.

The appellants were however aggrieved by the award of damages under the Fatal Accidents Act

and filed this appeal the gist of which is that dependancy was not proved evidence having been led that the deceased died aged 65 years and that all her children were adult children.

Arguing the appeal Miss Pandit, Learned Counsel for the appellants submitted that the trial magistrate failed to take into consideration an authority cited by the appellants on the issue of dependancy; that the trial magistrate having found that dependancy was not proved misdirected himself by awarding damages under that head. She submitted that in regard to payment of college fees it was the respondent's evidence that fundraisers were held for that purpose and that moreover the evidence of the appellant could not be trusted as she had included her own child and those of her sister in the claim. On the issue of the deceased's earnings she submitted that this differed in the pleadings and in the evidence yet the trial magistrate went ahead and plucked a figure from the air and this to her was a misdirection. She further observed that evidence was given that the respondent now runs her mother's business and submitted that as such the family have not lost anything. She contended that this issue was considered by the Court of appeal in the decision cited by the appellants and that the same principle ought to apply here. On the multiplier she wondered how the Trial Magistrate could have applied a multiplier of 5 years yet the deceased was 65years old and diabetic. She submitted that the said multiplier was excessive. She contended that all the deceased's children were adults and working and as such this Court ought to find that dependancy was not proved. She further submitted that as the parties claiming under both Acts were the same the damages awarded under the Law Reform Act ought to have been reduced from those under the Fatal Accidents Act and as this was not done that too amounted to a misdirection. She urged this Court to allow the appeal.

Mr. Mshindi, Learned Counsel for the respondent urged this Court to evaluate the evidence and make its own decision. He submitted that people can work up to 70 years so a multiplier of 5 years was fair particularly given that the deceased was in business. On dependancy he submitted that here even a person aged 42 years can ask their parents for money unlike in the West where that ceases when one attains the age of majority. He submitted therefore that that issue is superflous. In regard to the earnings he submitted that as the business was "jua kali" meaning informal the respondent would not be expected to have receipts or returns. He urged this Court to consider that this was a normal kibanda earning a paltry amount. Regarding the authority referred to by Miss Pandit he submitted that the same was irrelevant as in that case the business was a well established high class business not comparable to the one in this case. He urged the Court to dismiss the appeal.

In reply Miss Pandit submitted that the authority cited made reference to a 3 acre coffee farm. She reiterated that there were no audited accounts and that dependancy is a matter of fact and must be proved.

This is an appeal on quantum of damages only. In **Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another V. Lubia & Another (No. 2) [1987] KLR page 30** it was held:-

"1. The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

This principle was reiterated in **Asal V. Muge & Another [2001] KLR page 202** where it was held:-

"2. Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

The issue for determination therefore is whether in awarding damages under the Fatal Accidents Act the Trial Magistrate acted on a wrong principle.

Upon being cross-examined by Counsel for the appellants the respondent conceded that the

deceased died at the age of 65 years and that all her children were by then adults. She also stated that they were all working save for one who was in college. She however had no proof that he was in college. Asked how his college fees were raised it was her evidence that it was through fund raisers. It is for those reasons that Miss Pandit contends that dependancy was not proved and that as such damages for loss of dependancy ought not to have been awarded. She also takes issue with the trial Magistrate's assessment of the damages on the ground that the deceased's income was never proved and that the trial magistrate plucked the multiplicand from the air. She also faulted him on the multiplier used. She relied on the decision of the Court of Appeal in **Nairobi Civil Appeal No. 112 of 1995 Gerald Mbale Mwea V. Kariko Kihara & Gichomo Kihara (unreported)** which she stated was cited in the lower Court but which the trial magistrate failed to take into consideration.

In that case the deceased died aged 75 years and the respondents were aged 52 and 48 at the time of her death. According to them the deceased fed and educated their children and they had lost her support since her death; that she could have assisted them for a long time. However the evidence in the case revealed that they had their own farms and that some of their children worked as casual labourers and got paid for the work they did. The Court stated:-

"The respondents are in possession of the three acre coffee farm of the deceased. The first respondent was the manager of the coffee farm during the deceased's life time. It can be seen immediately that the respondents were simply bringing in the issue of their being dependant on the deceased to ground their claim under the Fatal Accident Act. The issue of dependancy is always a question of fact to be proved by he who asserts it. We do not see how the two respondents can lawfully claim to have been the dependants of the deceased (who was 75 years old at the time of her death) when they owned their own farms or farm and when the first respondent was the manager of the deceased's coffee farm.....We are unable to accept the respondent's counsel's argument that a 52 year old son and a 48 year old son were the deceased's dependants. Such alleged dependancy was in our view a sham. We hold that there was no dependancy at all in law which enabled the Learned Judge to consider the multiplier and the multiplicand. The award under the Fatal Accidents Act is set aside."

In his judgment the trial magistrate found as follows on the issue of dependancy:-

"Dependancy goes to the core of any claim under the Law Reform Act and Fatal Accidents Act. This suit is no exception. On this issue, I note that the Plaintiff has not tendered any document to prove dependancy on the deceased."

The Court was thus at a loss of establishing the correct position on the deceased dependants. Matters were not made any better by the discrepancies on who exactly were dependants of the deceased;The Court therefore believes the evidence that came across during cross-examination and finds that the deceased left behind five adult children aged between 42 and 27; and who are capable of fending for themselves....."

In short it was his finding that dependancy had not been proved. There was also no evidence at all to demonstrate that the deceased carried on a hotel business. In my view nothing would have been easier than to produce a business permit if she were. Accordingly in my view apart from there being no evidence of dependancy there was no evidence that the deceased who was 65 years old was working. The trial magistrate therefore acted on a wrong principle in awarding damages under the Fatal Accidents Act and in applying a multiplicand of 10,000/= when that was not supported by the evidence. Like the Court of Appeal in the **Gerald Mbale Mwea** case I set aside the award for loss of dependancy.

It was argued that the people to benefit from the damages under the Law Reform Act and the Fatal Accidents Act being the same the damages under the former ought to have been deducted from those awarded under the Fatal Accidents Act. On this I can only reiterate what was stated by the Court of Appeal in **Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another V. Lubia & Another (No. 2) (Suppra)**

"7. The Law Reform Act (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased person by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words "to be taken into account" and "to be deducted" are two different things. The words used in section 4(2) of the Fatal Accidents Act are "taken into account". The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

The trial magistrate did not in his judgment indicate that he had taken into account the damages awarded under the Law Reform Act and these would have been reduced from the award under the Fatal Accidents. However as I have stated the award under the Fatal Accidents Act shall be set aside. The award under the Law Reform Act shall be left undisturbed so that judgment for the respondents against the appellant shall be for a sum of Kshs.80,000/= together with interest from the date of judgment. The respondent shall also have the costs of the suit in the Court below but those of the appeal shall go to the appellant. It is so ordered.

Signed, dated and delivered at Kisumu this ..25th.. day of ..February... 2016

E. N. MAINA

JUDGE

In the presence of:

N/A for the Appellant

Mr. Amule for Kuke for the Respondent

CC: Felix Magutu