REPUBLIC OF KNEYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.151 OF 2011

MOSES SIGORIA SHAURI T/S

MULTIBRAND MARKETING ……..APPELLANT

AND

DANIEL INYANGALA AMBETSA ……RESPONDENT

(Being an appeal from the judgment of Hon. Mr. Nyakundi (CM) in Kakamega CMCC No.53 of 2007 dated 14/09/2011)

J U D G M E N T

The Pleadings

1. The respondent herein was the plaintiff in Kakamega CMCC No.53 of 2007. In his amended plaint dated 11/03/2010, the appellant sought the following reliefs against the respondent:-

    i) General damages for pain [and] suffering

    1a) General damages

    ii) Special damages kshs.37600.00

    iii) Costs and interest on (i) and (ii) above

2. The respondent's claim against the appellant was set out in paragraphs 3 and 4 of the amended plaint. In paragraph 1 of the plaint the respondent stated that he was suing in his capacity as administrator of the estate of the deceased Martin Asira Inyangala who was his son. Apart from that averment, the respondent did not set out particulars of any other dependants of the deceased but he stated that at the time of death the deceased was 25 years old and of good health and that he was a boda boda operator earning an average of Kshs.250/= a day which amount translated to a monthly average of Kshs.10,500/=, an income which the respondent said he lost when the deceased died.
3. The appellant filed his statement of defence on 17/06/2010 denying any wrong doing in the matter and particularly denied ownership of motor vehicle Registration Number KAN 996R. In the alternative the appellant averred that if any accident occurred on the material day an allegation that was denied then the same was solely caused by or substantially contributed to by the respondent herein. The appellant urged the Court to dismiss the respondent's case. The respondent filed reply to defence on 20/07/2010. In the course of the proceedings liability was compromised at the ratio of 75% to 25% in favour of the respondent.

Judgment of the Trial Court

4. After hearing evidence on quantum and after carefully considering the evidence, the submissions and the law, the learned trial Magistrate (as he then was)entered judgment in favour of the respondent as follows:-

a. Liability as per consent judgment - 75% : 25%

- Loss of expectation of life Kshs.100,000.00
- Pain and suffering Kshs. 10,000.00
- Specials Kshs. 22,500.00
- Lost years Kshs.300,000.00

Less 25% contributory liability thus bringing the amount payable to the respondent to Kshs.332625/= plus costs and interest at court rates until payment in full.

The Appeal

5. The appellant was dissatisfied with the entire judgment and preferred the appeal on the following two grounds:-

1. The Learned Trial magistrate erred in law and in fact in awarding damages which were neither pleaded nor proved.
2. The Learned Trial magistrate erred in Law in awarding sums in damages which was/is (sic) manifestly and/or inordinately high thus connoting an error in principle taking into account past decisions of the courts and the current trend of awards.

6. It is the appellant's prayer that the judgment and/or decision of the learned trial Magistrate in Kakamega CMCC No.53 of 2007 be set aside and/or quashed and in the alternative, this Honourable Court be pleased to review, vary and/or reduce the award of damages to accord with the law and/or relevant decisions.
7. This is a first appeal, and on this appeal this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own decision in the matter. It is only after such reconsideration and review that this Court would be in a position to say whether or not the conclusions reached by the learned trial Magistrate can stand. In the case of **Peters –vs- Sunday Post Limited [1958] EA 424**, the Court of Appeal for East Africa sitting at Nairobi citing the English case of **Watt –vs- Thomas [1947] AC 484** said at p. 429 – 430 that:-

"*Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but his jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given*"

LORD THANKERTON said at p.487

"I do not find it necessary to review the many decisions of this house, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

LORD MACMILLAN said at .491:

"So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

8. It is no doubt clear that the above are the guiding principles in this appeal and unless there is evidence on record showing that the learned trial Magistrate apprehended the law on the award of damages, this Court would be slow to interfere with its findings.

The Respondent's Case

9. The respondent testified as PW1 and as far as it relates to the issue in hand, he stated that the deceased was 21 years old at the time of his death, that he applied for and obtained limited grant of Letters of Administration for purposes of filing suit. That he incurred certain expenses in buying the coffin – Kshs.4580/=as per PExhibit 3 (a) transport – Kshs.3000/= as per PExhibit 3 (b) and that he slaughtered a cow worth Kshs.6000/= as per PExhibit 3 (c). That he also bought rice, sugar, milk and flour though he could not produce receipts. That he paid Kshs.20000/= being advocate's costs for the grant.
10. During cross examination, PW1 stated that the deceased died on the same day at the hospital. That the deceased was single and had no children.

The Appellant's Case

11. The appellant did not call any witnesses but filed written submissions in which it proposed the following awards:-

a)	Pain and suffering	-	Kshs.10,000.00
b)	Proven specials	-	Kshs.20,000.00
			Kshs.30,000.00
	Less 25% contribution		7,425.00
			22,575.00

In the alternative, the appellant proposed the following awards:-

a) Pain and suffering - Kshs. 10,000.00

b) Loss of expectation of life - Kshs.100,000.00

c) Special damages - Kshs. 20,100.00

Kshs.130,100.00

Less 25% contribution 32,525.00

97,575.00

Submissions

12. I have carefully read the rival submissions in this matter. In brief the appellant submits that the learned trial Magistrate erred in law and fact when he awarded damages that were neither pleaded nor proved. In particular, that the respondent did not give a list of dependants of the deceased and the manner in which such dependants depended on the deceased. The appellant relies on the provisions of Section 8 of the Fatal Accidents Act which require a plaintiff in a case of this nature to give full particulars of the person or persons for whom and on whose behalf the action is brought. That in this case, the respondent having failed to provide the details rendered the entire claim under the Fatal Accidents Act deficient, defective and incurably bad in law; and remains incomplete. That the trial court should not have assumed that the deceased's father was also the deceased's dependant.
13. On the second ground of appeal, it was submitted on behalf of the respondent that the award made by the trial court was within the law and should not be distributed

Determination

14. After a careful analysis of the submissions and the law, it is not in dispute that where a claim for compensation is brought both under the Fatal Accident's Act and the Law Reform Act, the party claiming should not benefit under both acts. That being the case, I am convinced that the alternative proposal by the appellant on this appeal sets out the correct position of the law but note that the appellant's complainants on special damages is misplaced since the appellant was privy to arriving at that figure. Accordingly.

I allow the appeal, set aside the Judgment of the learned trial Magistrate and in its place, I enter Judgment for the respondent as follows;-

a) Liability……..75% to 25% in favour of respondent

b) Loss of expectation of life ……..Kshs.100,000.00

c) Pain and suffering …….kshs. 10,000.00

d) Special damages ……Kshs. 22,500.00

kshs 132,500.00

Less 25% contribution 33,125.00

Amount payable 99'375.00

15. The respondent shall have costs of the suit in the lower court plus interest at court rates until payments in full. The appellant shall have the costs of this appeal.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this ……..21st ……..day of ……April, ……2016

RUTH N. SITATI

JUDGE

In the presence of ;-

…..……Mr. Wycliffe for Asuna……...for the Appellant

. …….Mr. Manyoni……....……..….for Respondent

.……Mr. Lagat……..Court Assistant