REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 486 OF 2008

WACEKE WAHINYA *(Suing as a dependant of the estate of*

PETER GATHII WAHINYA).....APPELLANT

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY

(MAKOMBOKI TEA FACTORY).....RESPONDENT

(Appeal from the original judgment and decree of Hon. Ms. Mutuku (SRM)

at Kigumo SRMCC No. 77 of 2006 on 1st September, 2008)

J U D G M E N T

1. The Appellant has filed this appeal on the following grounds:

i. The learned magistrate erred in law in failing to appreciate that the suit by the Appellant was based on a claim for general damages under Fatal Accidents Act.

ii. The learned magistrate erred in law in failing to appreciate that section 4 and 7 of the Fatal Accidents Act gives a dependant to a deceased person capacity to claim damages for his/her (dependants) benefit and hence pronounced the wrong decision.

iii. The learned magistrate erred in law and in fact in failing to consider the submissions by both counsels for the Appellant and the Respondent which clearly showed that the issue of the capacity of the Appellant to sue under the Fatal Accident Act without grant of letters of administration was not disputed hence pronounced the wrong decision.

iv. The learned magistrate erred in law and in fact in failing to find that the fact that the deceased was employed by the defendant as a casual worker was not disputed by the Respondent and hence pronounced the wrong decision.

v. The learned magistrate erred in law and in fact in failing to take judicial notice that no recordss are regularly kept in a casual employment and hence none could be provided in evidence and hence pronounced the wrong decision.

vi. The learned magistrate erred in law and in fact in failing to appreciate the Government Gazzetted wages which applied to the deceased and hence came to the wrong conclusion.

vii. The learned magistrate erred in law and in fact in dismissing the Plaintiff's suit with costs.

2. This being a first appeal I have warned myself of the duty of the first appellate court which is to re-evaluate and consider afresh the evidence tendered before the lower court and to draw my own conclusions bearing in mind that I did not have the benefit of seeing or hearing the witnesses testify unlike the trial court. See: **Selle v. Associated Motor Boat company Ltd (1968) EA 123.**

3. From the grounds above, it is clear that what is in contention is whether or not the appellant could sue under the fatal accident Act without letters of administration, whether or not the deceased was an employee of the Respondent and if he was, whether the trial magistrate failed to apply the Gazzetted minimum wages in calculating the loss of dependency and lastly whether the appellant proved her case on a balance of probability.

4. This court will proceed to consider the issues as set out hereinabove.

Whether or not the Appellant could sue under the Fatal Accidents Act, Cap 32 Laws of Kenya without letters of administration.

Section 7 of the Fatal Accidents Act states:

> ***"If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator."***

It therefore follows that an action can be maintained under the Fatal Accidents Act without letters of administration as long as, the action is brought by a person for whose benefit the action could have been brought by an administrator or executor if letters of administration were issued.

5. Section 4 of the same Act, enlists the persons for whose benefit the action could have been brought. It provides as follows:

> ***"4(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deduction of the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:***
>
> ***Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."***

6. The Appellant indicated in the plaint that he was suing in his capacity as a dependant of the estate of the deceased. She testified that she was the mother of the deceased. She produced a letter from the area Assistant chief to that effect. That evidence was not rebutted. She therefore, in accordance with Section 4(1) of the Fatal Accidents Act, qualifies to be a person for whose benefit the action is brought. Further, Order VII Rule 4(1) of the Civil Procedure Rules on capacity of parties (now Order 4 Rule 4.)states as

follows: -

> ***"Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises."***

7. The action was thus maintainable for the benefit of the Appellant under the Fatal Accidents Act. In the circumstances, I find that learned magistrate misapprehended the law in dismissing the Appellant's suit.

Whether or not the Appellant was an employee of the Respondent

8. In her testimony, the Appellant indicated that her son was an employee of the Respondent. She produced no documentary evidence to that effect. However, PW2, Eric Wanyoike Macharia testified to the effect that the deceased was his colleague at the Respondent's employment. He was put to task as to whether the deceased was present during payment and he stated that he did not see him on the material day. From the evidence on record there is a high probability that this is the day the deceased met his death as he was not seen at the pay point yet there is evidence that he boarded the motor vehicle at the quarry. It is worth noting that although the Respondent denies that the deceased was its employee, it tendered no evidence to that effect while the Appellant brought PW2. The evidence of PW2 was not challenged by the Respondent with any evidence to the contrary. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. It was never suggested that the employment record or casual workers records could not be traced or even indicate why it could not be brought. In the circumstances, I find that the Appellant established that the deceased was an employee of the Respondent.

Whether or not the Appellant proved his case on a balance of probability

9. It emerged from PW2's testimony that the deceased had on the material day boarded the subject motor vehicle. He was found dead at the quarry the following day. He had sustained injuries as per the evidence on record. The Appellant in her plaint pleaded the doctrine of *Res Ipsa Luquior* (I will consider the doctrine shortly). The Respondent did not, however, bother to tender evidence to help the court ascertain whether or not it was liable for the accident. Prudence required the Respondent to have availed its driver to narrate to the court the going ons on that day. Having withheld that evidence, I find that such evidence would have been adverse to the Respondent. The deceased died while in employment of the Respondent and in unclear circumstances. In the end I find that the Respondent having failed to offer any explanation as to how the deceased met his death, it cannot escape liability. **I am guided by the Court of Appeal's finding in the case of Embu Public Road Services Ltd. v.Riimi (1968) EA 22 where it was held that:**

> ***"…where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitur and hold the defendant liable in negligence."***

10. And also the finding in **Nandwa v. Kenya Kazi Ltd (1988) KLR, 488** where it was held that:

> ***"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."***

The above two cases demonstrate the applicability of the doctrine of Res Ipso Loquitur.

Whether or not the trial magistrate failed to apply the gazetted wages.

11. Having said so, I now embark on resolving the above issue. The principles which guide an appellate court in deciding whether or not to interfere with the award of damages made by the trial court have been

established in various judicial pronouncements.

12. In **Kemfro Africa Limited t/a "Meru Express Services (1976) & Another v. Lubia & Another (1987) KLR 30** the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge

> "***it must be satisfied that either the 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…"***

13. Similarly in **Butt V Khan (1977) 1 KAR** the Court of Appeal held as follows;

> ***"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low…."*** See also: ***Shabani V City Council of Nairobi Court of Appeal No. 52 of 1984 (1985) KLR 516.***

14. I shall, while dealing with the above issue apply the said principles. The learned magistrate stated that she could have used a multiplicand of KShs. 3,000/- if there was proof that the deceased used to be paid KShs. 150/- per day. I shall reiterate my earlier finding on proof of employment. There being no proof of earnings, the learned magistrate ought to have applied the Gazetted minimum wage for that particular period. Bearing in mind that the deceased was a casual labourer, the applicable minimum wage then as per Legal Notice No. 38 of 2006 was KShs. 4,792/=.

15. The deceased's estate which was represented by the Appellant was entitled to damages for loss of dependency, his life having been abruptly cut short by the accident at the young age of 29 years given that the deceased was 29 years at the time of his demise and being a casual labourer, he would have worked for another 20 years considering the vagaries of life. I find that the trial magistrate erred in the issue of the multiplier. I find legal backing from the pronouncement of the Court of Appeal in ***Jacinta Wangari v. Kenya Bus Services Ltd (1996) eKLR.***

16. On the dependency ratio, the deceased was not married; the Appellant testified that she relied on him for her basic needs. Although she offered no proof, her evidence was not controverted. I therefore adopt a dependancy ratio of $^1/_3$.

17. In the end I allow the appeal, set aside the trial magistrate's findings and substitute them as follows:

i. Loss of dependency 1/3 × 4,792/= × 20 ×12 = Kshs. 383,360/=

ii. Special damages – NIL

Costs of the appeal are awarded to the Appellant.

Dated, delivered and signed at Nairobi this 28th day of November, 2016.

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L NJUGUNA

JUDGE