



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 45 OF 2015
(FORMERLY KISII HCCA NO. 173 OF 2013)

BETWEEN

NAMWEL AGWERA ONSASA APPELLANT

AND

**JOHN OTIENO OBONYO suing as the administrators of the
estate of GABRIEL OMONDI OTIENO (Deceased) RESPONDENT**

AND

***(Being an appeal from the Judgment and Decree of Hon. S. N. Makila, RM in Chief Magistrates
Court at Oyugis in Civil Case No. 89 of 2012 dated 26th November 2013)***

JUDGMENT

1. The appellant, as personal representative and administrator of the estate of the deceased, filed the suit against the respondent seeking compensation as a result of a road traffic accident which occurred on 20th April 2012. It was not disputed that the deceased was walking along the Oyugis-Kisumu Road near Chabera when he was hit by the respondent's motor vehicle. The respondent filed a defence denying liability and instead blamed the deceased for walking on the highway. Ultimately, the issue of liability was settled by consent of the parties with the respondent bearing 80% and the appellant 20%.
2. The matter proceeded for assessment of damages and the awarded the estate of the deceased a global award of Kshs. 500,000/- under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** for loss of dependency subject to the agree contribution.
3. The appellant appeals against the judgment on the following grounds set forth in the memorandum of appeal dated 19th November 2013;
 1. *The Learned Honourable Magistrate erred in fact and in law when it escaped her attention that the Respondent was not seized of the requisite capacity and/or locus standi so as to mount the and/or originate the suit herein.*
 2. *The Learned Trial Magistrate erred in law and in fact by awarding the Respondent general damages in the sum of Kshs. 500,000/- which damages were excessive in circumstances and not proved at all.*
 3. *That the learned Trial Magistrate erred in law and in fact, by failing to dismiss the*

Respondent's suit with costs to the Appellant.

4. Counsel for the Appellant, Ms Kusa, submitted that according to the plaint filed in the subordinate court, the appellant described himself as the personal representative and administrator of the estate of the deceased's estate yet he did not have the requisite grant of letters of administration therefore he could not agitate the suit in that form. She also noted that the court made the award in favour of the deceased's estate which was improper as the respondent lacked such a capacity. On the issue of the award, learned counsel argued that the award of Kshs, 500,000/- was excessive and not in line with current decisions where the deceased was 19 years old and in Standard 7.
5. Counsel for the respondent, Mr Odero, conceded that respondent did not have letters of administration but that since was a case under the **Fatal Accidents Act**, the respondent had pleaded supplied all the particulars required by the **Act** and the case proceeded on the basis that it was a case under the said **Act**. He argued that the appellant knew the case they were facing and they were not prejudiced as they only raised the issue of *locus standi* on appeal. Counsel submitted supported the award of damages.
6. This is a case of pleading without attention to the provisions of statute. Paragraph 1 of the plaint states that the respondent instituted the case, "*as the administrator and personal representative of the estate of one GABRIEL OMONDI OTIENO.*" Although pleaded as such, it is clear from the pleadings that the respondent's claim was made under the **Fatal Accidents Act**.
7. **Section 7** of the **Act** provides that if there is no administrator or executor appointed within 6 months of death, the suit may be instituted in the names of all the dependants. It states as follows;

7. 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." [Emphasis added]

8. It is well settled law that a plaintiff lodging a claim under the **Fatal Accidents Act** does not require a grant of letters of administration (see **James Mukolo Elisha & Another v Thomas Martin Kibisu NRB CA Civil Appeal No. 31 of 2006 [2014]eKLR** and **Troustik Union International & Another v Mrs Jane Mbeyu & Another MSA CA NO. 145 of 1991[1993]eKLR**).
9. In my view, the assertion that the plaintiff was an administrator and personal representative was merely descriptive and a harmless error on the part of the respondent. Besides, the parties recorded a consent on liability and although the appellant in the defence denied capacity, he did not raise the issue in the submissions. From the evidence it is clear that the respondent was a father of the deceased and therefore a person entitled to bring this claim. In other words he had the capacity to agitate the suit as such notwithstanding the description.
10. I therefore hold that the respondent, as a dependant of the deceased within the meaning of the **Fatal Accidents Act** had the capacity to file the suit. I also find that his description as an administrator of the deceased's estate was a harmless error which was also reflected in the judgment. This ground of appeal therefore fails.
11. On the issue of quantum the general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR**). The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88]**

KAR 5 stated as follows;

An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

12. In the court below the respondent submitted he was entitled to damages on the basis of the multiplier approach on the basis that he deceased would proceed to work in the public service for a period of 41 years. The learned magistrate rejected the multiplier approach and accepted the lumpsum approach proposed by the appellant. The court awarded a global lumpsum of Kshs. 500,000/- for loss of dependency. The respondent did not cross-appeal this decision.
13. The issue then is whether the award of Kshs. 500,000/- is inordinately high to attract interference of this court. In the submissions, the respondent proposed a sum of Kshs. 400,000/- based on the following cases; ***H. Young & Company EA & Another v James Gichana Oronge Kisii HCCA No. 207 of 2009 (UR)*** where the court awarded Kshs. 300,000/- in 2011 and ***Wesley Kipkoech Kendagor v Unistar Transporters Ltd Kericho HCCC No. 116 of 2004[2007]eKLR*** where the court awarded Kshs. 500,000/- .
14. As the appellant clearly submitted that the respondent was entitled to Kshs. 400,000/- in the subordinate court, I cannot accept the submission that at this stage Kshs. 300,000/- is reasonable. At the appeal stage the court considers what was before the trial court and in reviewing the same, I cannot say the learned magistrate erred in awarding the sum of Kshs. 500,000/- in light of the facts and submissions made before her.
15. For the foregoing reasons, I therefore dismiss the appeal with costs to the respondent.

DATED and DELIVERED at HOMA BAY this 30th day of April 2015.

D.S. MAJANJA

JUDGE

Ms Kusa instructed by O. M. Otieno and Company Advocates for the appellant.

Mr Odero instructed by Odero Okeyo and Company Advocates for the respondent.