



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HCA NO.42 OF 2012

(Appeal from the decision by Hon. C. Ocharo in Malindi CM CC No.308 of 2009)

K J B APPELLANT

VRS

ANTONELLA CANTALLUPPI..... RESPONDENT

JUDGMENT

The appellant's brother S J B was involved in a fatal road accident on 19/9/2006. The appellant filed Civil Suit No.308 of 2009 before the Malindi Subordinate Court. The court awarded the appellant damages totaling ksh.120,000/- on 100% basis less 30% agreed contribution giving a balance of ksh.84,000/-. This award led to the filing of the current appeal.

The main grounds of appeal are that the trial court did not consider the submissions of both parties, that the deceased had a child and wife yet no damages were awarded under the Fatal Accident Act, that the damages awarded are extremely low and that the trial court used the wrong computation in arriving at the damages awarded.

Parties agreed to determine the appeal by way of written submissions. The main issue being raised are that the deceased had a wife by the name F and a daughter called R. The two were the deceased's dependants. The plaintiff informed the court that the family paid mortuary fees of ksh.50,000/-, transport of ksh.25,000/- and bought a coffin for ksh.25,000/- but these amounts were not awarded. It is submitted that the award is not reasonable. There was evidence that the deceased was a mason earning ksh.450/- per day. Even the defence submitted for ksh.240,000/- as damages under the Fatal Accident Act offering a multiplier of 20 and a monthly pay of ksh.3,000/-. It is submitted that the trial magistrate erred in law by not awarding damages under the Fatal Accidents Act. Counsel is seeking an award of ksh.1,440,000/- under the Fatal Accident Act for loss of dependency. This amount is accrued from a monthly salary of ksh.9,000/- and a multiplier of 20 years.

On their part, counsels for the respondent submit that no certified decree was extracted, the Record of Appeal lacks index and pagination and that the proceedings have not been certified. It is also submitted that the trial court was correct in dismissing the claim under the Fatal Accident Act.

The record of the trial court show that parties recorded a consent at the ration of 30:70 in favour of the appellant. The record of the trial court seems to be mixed up. The case was initially heard by C. Ocharo, RM. It was heard ex parte and damages of ksh.501,045/- was awarded on 19/1/2010. Parties agreed to set aside the ex-parte judgment and they recorded a consent on liability. The suit was subsequently heard by Mr. Yusuf Shikanda. However, the judgment delivered by Mr. Shikanda on 12/11/2012 still indicates that it was a judgment of C. Ocharo.

The handwritten record shows that only one witness testified, the appellant. The proceedings before C. Ocharo indicate that two witnesses had testified. The appellant informed the court that on 19/9/2006, he was at his place of work when he got a call and was informed that his young brother had been involved in an accident at Casharina road next to Blue Key in Malindi. His further evidence was that the deceased was a mason earning ksh.450/- per day. He had a wife by the name F K and a child, R S . The family paid ksh.25,000/- for a coffin, ksh.25,000/- for transportation and ksh.25,000/- as mortuary fees. The deceased's child was attending school.

The trial magistrate dismissed the claim under Fatal Accident Act. The trial court noted as follows:

“An action under the Fatal Accidents Acts is brought for benefit of the deceased person's dependants who include the wife, husband, parent and child. This action was brought for the benefit of the wife and child of the deceased.

The action was brought by the deceased person's brother who was not a dependant of the deceased and a child who depended on him. The wife was not even called to testify. In any event, the action ought to have been brought by the wife unless there was an express consent by her for the action to be instituted by the brother to the deceased. No marriage certificate nor birth certificate or other evidence was adduced to prove that the deceased had a wife and a child. There is therefore my finding that, there is no proof of dependency and as such no damages are venerable under the Fatal Accident Act.”

I do find that the above findings were wrong. It is not the law that only documentary evidence can prove marriage or birth. Even if the wife was not called to testify, there was no other evidence to disprove the appellant's evidence. The plaint dated 7/9/2009 specifically stated that there were dependants namely the wife, F K aged 29 years and a daughter, R S aged 7 years. These names were not an afterthought. The defence did not adduce any evidence.

In the Case of **Jacob Ayiga Maruja & Another v Simone Obayo: Civil Appeal No.107 of 2002 [2005] eKLR**, the Court of Appeal stated the following:

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

Normally, a higher court would not interfere with the amount of damages awarded by a lower court. In the Case of **Mbogo & Another v Shah [1968] EA, 93**, the court noted as follows:

“...it is well settled that this court will not interfere with the exercise of its discretion by an interim court. Unless it is satisfied that its decision is clearly wrong, because it had misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

The trial court correctly noted that the suit was brought for the benefit of the wife and child of the deceased. Assuming there was no wife, did the trial court doubt that the deceased had no child. The trial court also erroneously held that it was the wife who was to file the suit, or she ought to have given her consent to the filing of the suit. The appellant was issued with a limited grant in Malindi Succession Cause Number 24 of 2008. He was authorised by the court to file the suit. No grant was issued to the wife. It cannot be held that the suit was improperly filed.

Section 4 (1) of the Fatal Accident Act states 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 to 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 deducting 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.”

The above provision is in line with the provisions of section 8 of the same Act which requires the plaintiff to state the full particulars of the person or persons for whom and on whose behalf the action is brought. This suit was brought by a duly court appointed administrator. There is no requirement that the administrator must be the widow although she ranks first compared to the brother.

Counsels for the respondent are in agreement with the findings of the trial court. It is clear that in their submissions dated 5/10/2012, the counsels offered to pay damages under the Fatal Accident Act. A monthly salary of ksh.3,000/- and a multiplier of 20 years was offered.

Given the evidence on record, I do find that the trial court did not apply the proper legal principles. The appellant was entitled to damages under the Fatal Accident Act. There were dependents who were pleaded in the plaint. There was no controverting evidence. This is a civil case which need not be proved beyond reasonable doubt.

There is evidence that the deceased was engaged in gainful activities. Before C. Ocharo, Julius Tunde Ndaa who was PW2 and witnessed the accident, testified that the deceased used to work on the opposite side of the road where the accident occurred. The deceased had left his work place and was crossing the road using a bicycle when the accident occurred.

It is clear to me that the deceased was catering for his family. The trial court indicated that it could have used a monthly salary of ksh.3,500/- had dependency been proved. Counsel for the appellant is seeking ksh.9,000/- monthly and a multiplier of 20 years.

The deceased was aged 25 years as per the death certificate dated 31/10/2006. the appellant informed the court that he is not a dependent. There was the wife and daughter who depended on the deceased. I do find that 2/3 dependency ratio on the deceased is payable to the dependants. I further find that ksh.6,000/- as the deceased's monthly wage is fair. I do assess damages under the Fatal Accident Act as follows:

$$6,000 \times 20 \times 12 \times \frac{2}{3} = 960,000/-$$

Counsel for the respondent submitted that the Record of Appeal is defective and that no certified copy of the decree was filed. I found these submissions to have been overtaken by events. Parties appeared before me on 14/7/2015 and agreed to determine the appeal by way of written submissions. Striking out the appeal cannot be part of determining it. The appeal has to be determined on its own merit and either be allowed entirely or partly or it can be dismissed.

There is the contention that once damages under the Fatal Accident Act are awarded, then any damages under the Law Reform Act must be netted off therefrom. This is not derived from any statutory provision.

Section 2 (5) of the Law Reform Act states as follows:

“(5) The rights conferred by this part 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 persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United

Kingdom, and so much of this part as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).”

In some cases courts have been off-setting damages under the Law Reform Act from those damages awarded under the Fatal Accident Act. It should not be lost that such cases deal with a deceased person who left dependants. The greater the amount accumulated as part of the deceased's estate, the better for the dependants. Where an accident victim loses a limb such as a hand, he is awarded damages for pain and suffering, damages for diminished capacity to generate income and damages for cost of prosthesis. All these damages go to the same person. The beneficiary could have used the general damages for pain and suffering to purchase the prosthesis. However, the damages are awarded under separate titles.

There is no harm in awarding damages under the Fatal Accident Act as well as under the Law Reform Act and failing to net off the latter from the former. In any case the damages awarded cannot be said to be 100% empirical computation for the loss of life.

I do find that the damages awarded by the trial court to be extremely low. The appeal is merited and is hereby allowed. Although at times parties insist on proof of funeral expenses, section 6 of the Fatal Accident Act allows the court to award funeral expenses in form of damages. No one burries himself. Expenses are incurred during any burial. It is not in line with African Culture to demand a receipt for every expense incurred in a burial. The grave has to be dug, the body has to be transported, religious people will be involved to pray for the deceased and family members will stay at the deceased's home so that they can mourn with the close relatives of the deceased. Such people have to be fed. It is impossible to keep or demand a receipt for all those expenses.

The trial court did not award any damages for burial expenses. The plaintiff pleaded for further or other relief as the court could deem fit to grant. I found that since the body was kept in the mortuary, transported to the burial place and finally buried, the appellant incurred expenses. I do award ksh.20,000/- as funeral expenses.

In the end, the appeal succeeds. The award of ksh.100,000/- by the trial court under the Law Reform is reasonable. The same applies to the award of ksh.20,000/- for pain and suffering. The deceased died on the spot. The appellant is awarded damages under the Fatal Accident Act as herein stated. The total award shall be as follows:

i. Pain and suffering	-	ksh.20,000/-
ii. Loss of expectation of life	-	ksh.100,000/-
iii. Loss of dependancy	-	ksh.960,000/-
iv. Funeral expenses	-	ksh.20,000/-
v. Special damages	-	ksh.1,045/-
TOTAL	-	Ksh.1,101,045/-
less 30% contribution		330,313/-

BALANCE - Ksh.770,731/-

The appellant shall have costs of the appeal and the costs awarded by the trial court.

Dated, signed and delivered at Malindi this 12th day of November, 2015.

SAID J. CHITEMBWE

JUDGE