



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 46 OF 2010

LAWRENCE CHINDITIAPPELLANT

VERSUS

AINU SHAMSI LTD.RESPONDENT

(Being an Appeal from the Judgment and Order of Hon. Mutoka – Chief Magistrate made on 19th February, 2010 in Chief magistrate's Civil case Number 456 of 2009).

JUDGMENT

This appeal arises from the Judgment dated 19th February, 2010 in Chief Magistrate's Civil Case Number 456 of 2009.

The grounds being that the trial magistrate failed to award damages under the fatal accidents Act Cap 32 for loss of dependency and secondly that she awarded Ksh. 10,000/= for pain and suffering a figure which is inordinately low in the circumstances of the case.

The plaintiff in this case filed this suit on behalf of the Estate of Mangale Mrabu who died as a result of a Road Traffic accident that occurred on 20th July, 2007 with the death occurring three days later on 23rd July, 2007. The matter proceeded by way of formal proof after the Defendant failed to enter appearance and file defence after service. At the time of death the Deceased was aged twenty two (22) years and was generating an income of Ksh. 25,000/= per month and supporting his family with Ksh. 15,000/= and among his dependents were his mother, sister and three brothers.

The learned trial Magistrate in her Judgment awarded the plaintiff general damages as follows;

- I. Pain and suffering Ksh. 10,000/=
- II. Loss of expectation of life ksh. 100,000/=

(b) Loss of dependency – Nil

(c) Special damages Ksh. 20,000/=.

Being aggrieved by this Judgment the Plaintiff filed this appeal. On the ground of failure to award damages for loss of dependency under the fatal accidents Act. It is contended that plaintiff tendered evidence that the Deceased was earning an average of Ksh. 25,000/= per month out of which Ksh. 15,000/= he would use to support his mother. Further that evidence was not challenged and hence the facts were uncontroverted and ought to have been taken as they were.

Also challenged is the award of Ksh. 10,000/= for pain and suffering. It is contended that the learned trial magistrate made that award on the grounds that the Deceased was in a coma for the three days hence here was no much pain and suffering on the part of the Deceased whereas there was no evidence that he was in a coma during that period.

That the death certificate showed the cause of death as intracranial skull fracture.

The main grounds for this appeal are;

1. That the learned magistrate erred in law and in fact in failing to award any damages under the fatal accidents Act cap 32 for loss of dependency.
2. That the learned magistrate erred in law and in fact in awarding Ksh. 10,000/= for pain and suffering a figure which is inordinately low in the circumstances of this case.

In the Court of Appeal Case of Kemfro Africa Ltd. & Another – vs- Lubia & Another (1976 - 1985) EA. It was held,

“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 are that 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 high that it must be a wholly erroneous estimate of the damages”.

In the present case, the Defendant did not enter appearance. Ex parte Judgment was entered and the matter proceeded to formal proof.

There is evidence that is uncontroverted that the accident occurred on 20th July, 2007 but the Deceased died on the 23rd day of July, 2007. For pain and suffering the learned magistrate made an award of Ksh. 10,000/=. On the grounds that for the three (3) days the Deceased was in Hospital he was in coma and hence by deduction he was not suffering pain. There was no evidence placed before her by way of medical notes or any other documentary evidence that the Deceased was in a coma. The only evidence produced before her was that of a death certificate which showed the cause of death as intracranial skull fracture.

In assessing the damages for pain and suffering the trial magistrate placed reliance clearly in non-existent factors and hence arrived at an award which was inordinately low.

Bearing in mind the circumstances of this case I find an award sum of Ksh. 100,000/= for pain and suffering.

On the issue of dependency under the fatal accidents Act Cap 32 Laws of Kenya.

The plaintiff tendered evidence that the Deceased was a turnboy and was earning an average of Ksh. 25,000/= inclusive of other earnings from sale of used clothes and from that amount he was supporting his mother sister and brothers with Ksh. 15,000/=.

The learned trial magistrate correctly pointed that if there was any dependency it was available only to the mother but not the sister and brothers.

Section 4 (1) of the fatal accidents Act provides,

“ 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 caused”.

This clearly ousts the sister and brothers.

Secondly, there is no evidence if as argued that the Deceased was a turnboy. It is not indicated who was his employer, for what vehicle and what registration number of the vehicle was he working in.

In the case of **Bonham Carter –Vs- Hyde Park Hotel Ltd. (948) 64 TRL 177 Lord Gudderd** Chief Justice stated,

“The plaintiff must understand that they cannot just write particulars and “throw” them at the Court asking for damages to be granted on such particulars only, they must strictly prove the same. It was therefore incumbent the plaintiff to strictly prove his allegations as set out – the plaint”.

In the present case, it was no proved that the Deceased was working as a turnboy or in any other capacity and or whether there was any dependency on him by his mother.

The upshot is that this Court will only interfere at the award for pain and suffering by raising it from Ksh. 10,000/= to Ksh. 100,000/=.

The other remain the same save for the totals which are raised by Ksh. 90,000/= to Ksh. 220,000/=.

Judgment delivered dated and signed this **9th** day of **April, 2014**.

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M. MUYA

JUDGE

9TH APRIL, 2014

In the presence of:-

Learned Counsel for the appellant Mr. Mwawasi holding brief Munyao

Learned Counsel for the Respondent Mulema

Court clerk Musundi

M. MUYA

JUDGE

Court: Furnish parties with certified copies of the ruling.

Mr. Mulema: We ask for thirty (30) days stay of execution **Mwawasi:** No objection.

Court: There will be stay of execution for thirty (30) days only.

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M. MUYA

JUDGE

9TH APRIL, 2014

