



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO.370 OF 2009

(An Appeal arising from Judgment by G. W. Macharia (Mrs.) –

PRINCIPAL MAGISTRATE – KIAMBU CM. Civil Case No.263 of 2004

delivered on 22nd June 2009)

ANN WANGARE MWOMBE.....1ST APPELLANT

IGOGO KAMAU.....2ND APPELLANT

PAUL KARONGO IGOGO.....3RD APPELLANT

VERSUS

PETER MUKIRI GATERI.....RESPONDENT

JUDGMENT

INTRODUCTION

The appeal arises from a fatal accident that occurred on 19th April 2014 where the deceased, Paul Karongo Igogo; Plaintiff/Appellant was hit by motor vehicle KAH 804Y Isuzu Canter belonging to Peter Mukiri Gateri; Defendant /Respondent. His driver, John Mwangi Njihia hit the deceased and he sustained fatal injuries and died.

The matter arose in the Magistrate's court. The Plaint filed on 21/10/2004 indicates on 19/4/2004, Paul Karongo Kigogo was lawfully walking along Limuru /Nairobi road near Ndenderu, when the defendant, Peter Mukiri Gateri owner of motor vehicle Reg. No KAH 804Y who authorised driver John Mwangi Njihia to drive the car, and at the place and time, he drove negligently and/or carelessly drove, managed and/or controlled the said motor vehicle that the same veered off the road, knocked down the deceased as a result of which he sustained fatal injuries.

FACTS (EVIDENTIARY)

The matter arose in the Court of First Instance. The Plaintiff filed on 21st October 2004 indicates 19th April 2004, Paul Karongo Kigogo was lawfully walking along Limuru /Nairobi road near Ndenderu, when the defendant, Peter Mukiri Gateri owner of motor vehicle Reg. No KAH 804Y who authorised driver John Mwangi Njihia to drive the car, and at the place and time, he drove negligently and/ or carelessly drove, managed and/or controlled the said motor vehicle that the same veered off the road, knocked down the deceased as a result of which he sustained fatal injuries.

PLEADINGS & SUBMISSIONS

PLEADINGS

The Plaintiff was filed on 21st October 2004 by Anne Wangare Mwobe and Freddie Igogo Kamau, legal representatives of the estate of Paul Karongo Igogo, The deceased against the defendant, Peter Mukiri Gateri, the owner of motor vehicle KAH 804Y Isuzu Canter driven by John Mwangi Njihia.

The cause of action is negligence; particularized as driving without due care and attention, failing to brake, slow down or swerve, control or manage the motor vehicle to avoid the accident and using excessive speed.

The plaintiffs sought general and special damages interest and costs of the suit and any other relief the Court deems fit.

The defendant filed defence to the suit on 18th November 2004 in which he denied the Plaintiff's claim and particulars of negligence. He also denied ownership of the vehicle KAH 804 Y and the occurrence of the accident. In the alternative, the defendant claimed the respondent suffered fatal injuries resulting to his death as a result of his own negligence. The particulars of negligence are that the deceased walked in the middle of the road, failed to notice KAH 804 Y early in order to avoid the accident, he moved into the way of the oncoming motor vehicle and he walked without due care and attention and his safety.

ORAL EVIDENCE

The evidence adduced by PW, Ann Wangai Mwombe (wife of the deceased) was that she was married to the deceased and they had 3 children. They are David Stephen Igogo (born 1987) Hannah Wambui (born 1990) and Lucy Nyambura (born 1993). She produced an affidavit (*P.Exhibit 3*) to prove marriage to the deceased under customary law, she produced the death certificate (*P.Exhibit 2*) of the deceased and receipts to claim special damages (*P.Exhibit 6, P.Exhibit 7 & P.Exhibit 8*)

PW2 Patrick Ojwang, the Police officer who visited the scene of the accident. He filled and produced the Police abstract (*P.Exhibit 4*), he did not investigate the matter, he was not at the scene of the accident, he did not find victim and lorry at the scene the police abstract indicated (PUI- pending under investigation)

PW3 recalled on 10th April 2004 while he was grazing cows and planting napier- grass on the road reserve outside his home, as he waited to cross the road and wheel the wheel barrow he saw a milk lorry hit a pedestrian who was off the road on the left side as he was. The lorry hit rubble strips and swayed and he saw what he thought were clothes flying. He heard screams and realized it was a person. The lorry was KAH 804Y. He rushed and found the deceased alive and took him to Karuri Health Centre. He knew him and his family as neighbours.

The defendant did not adduce any evidence.

SUBMISSIONS

The plaintiff submitted through Counsel that she was the wife to the deceased and they had 3 children. The deceased was a businessman and farmer and earned a monthly income of Ksh. 50,000/=

In terms of liability, the deceased's death was caused by negligence by the defendant proved by evidence of the eye-witness PW3.

The plaintiff submitted claims under the Fatal Accidents Act and Law Reform Act.

The Defendant through Counsel submitted that the plaintiff did not prove marriage as she did not produce marriage certificate, did not produce birth certificates as proof of children of the marriage. The police abstract did not blame the defendant for the accident and PW2 said he did not conduct investigations and when he went to the scene, he did not find the victim and or the lorry at the scene.

Of PW3 's evidence as an eye- witness, the defendant submitted that witness lied that he was at the scene grazing cows and ferrying manure and could see what happened. He lied that Police were at the scene a fact PW3 denied. He lied that he took the deceased to hospital using the deceased's brother's car and he did not say where he got it from nor give its registration number.

The Respondent further reiterated that the Plaintiff did not specifically plead the claim under Fatal Accidents Act and was unable to show how much, the deceased spent on a non -existent family. The Court if at all should find a global figure of Kshs. 50,000/- sufficient.

JUDGMENT

The learned magistrate evaluated the evidence on record and on liability on discounting the testimony PW3 witness of the accident, apportioned liability at 60/40%.

On quantum, the Court did not assess the damages under the **Fatal Accidents Act** as the Plaintiff did not plead the same in the Plaint.

Under the law Reform Act, the Court assessed

Kshs. 10,000/- for pain and suffering

kshs.100,000/- for loss of expectation of life

Ksh. 10,000/- special damages

Less 40% contribution by the deceased

Kshs. 72,000/-

The special damages were awarded as follows; with regard to legal fees Kshs. 15,000/- for filing for letters of administration was pleaded but the fees related to another case and the lawyers would recover from the Plaintiff's legal representative. Kshs.500/- paid for copy of records was not pleaded in the Plaint and therefore not granted.

APPEAL

The memorandum of appeal was filed on 15th July, 2009.

PROCEDURAL FACTS

The matter was for directions on 11th July 2014 where the Judge found the appeal was filed 9 days late. Judgment was delivered on 22nd June 2009. The memorandum of appeal was filed 31st July 2009. The appeal was filed 9 days late. The High Court ordered a mention on 25th July 2014.

On the mention date, both parties were represented; Ms. Ndirangu for the appellant and Ms. Otieno for

the Respondent. The court confirmed in the presence of Counsel the memorandum of appeal in the Court file was filed on 15th July 2009. The Court official receipt confirmed the same date and payment of the requisite fees.

The appeal was listed for hearing during the Civil Service Week and parties here served through the Deputy Registrar; High Court.

EVIDENTIARY FACTS

The memorandum of appeal raised 7 grounds of appeal summarized as follows;

The Trial Court erred in finding the deceased to bear contributory negligence where there was no evidence to support the same.

The contributory negligence ratio of 40% against the deceased was contrary to the evidence on record.

The Trial Court erred in finding that the appellants had not prayed for damages under the Fatal Accidents Act

The Trial Court erred in finding the appellants were not entitled to special damages in the sum of Kshs.15,000/- incurred in obtaining limited grant of letters of administration

The Trial Court erred and failed to pronounce the award she would have otherwise arrived at had she made a finding under the **Fatal Accidents Act**.

Counsel made oral submissions on 25th July 2014 and undertook to prepare exchange and submit written submissions by 15th August 2014. The submissions filed and received were from the Respondent.

The Appellant's Counsel submitted with regard to Grounds 1 & 2 of the memorandum of appeal;

PW3 the only eye witness to the accident testified motor vehicle KAH 804 Y was dangerously driven and as a result swayed and killed the deceased. The defence did not adduce any evidence. The Trial Court was of the view it was not logical that the witness saw how the deceased was hit. The Trial Court did not base the same on any facts. The Trial Court inferred negligence and did not have any facts before it

In the judgment the Court did not state the law and facts relied on to reach the conclusion. Counsel referred to the case;

CHABBADIYA ENTERPRISES LTD VS JAMES KARANJA MUHUHO CIVIL APPEAL NO 147of 2011. Where the Court observed the loss of dependency must be justified and negligence must be proved

With regard to Grounds of Appeal 3, 4 & 5 of the memorandum of appeal

The appellants pleaded claim under the **Fatal Accidents Act** as evidenced by paragraph 1, 5, 6 & 7 and evidence was produced to support the claim through the affidavit of marriage and proof of earnings. The evidence of PW3 corroborated evidence of PW1.

Counsel also referred the Court to the case of **GREAT LAKES COMPANY LTDVs KENYA REVENUE AUTHORITY C. A.** in Mombasa where the Court observed, that general damages were not prayed for but the Court relied on Article 159 (2) of the Constitution.

With regard to Ground 6 of memorandum of appeal the claim for special damages of Kshs. 15,000/- was pleaded and proved. The Trial Court ought to have awarded the same.

Counsel referred to the case of **MILDRED AWORI ODUNGA vs HUSSEIN DAIRY LTD** where the Court observed as in Ground 7 of the memorandum of appeal, the appellant submitted the Trial Court failed to assess the damages had the court made a finding for damages under the **Fatal Accident Act**.

In this case **ANNE WAMBUI NDERITU & JOSEPH KIPRONO ROPKOI & ANOTHER C.A. 345 of 2000**

The Appellant seeks liability at 100% to the driver of KAH 804Y. Plaintiff was entitled to damages for Fatal Accident Act. Plaintiff awarded Kshs. 15,000/- special damages. The Appeal allowed.

The Respondent opposed the appeal on the following grounds as outlined in the oral and written submissions;

The appellant did not plead the Fatal Accident Act. In paragraph 1 where mentioned it was descriptive and not specifically pleaded in a separate paragraph with the heading; **FATAL ACCIDENT ACT**.

On Liability; the Respondent agreed with the Trial court's position; that the deceased contributed to the accident. The plaintiff could not prove any fact about the accident or negligence by the defendant. The Appellant did not prove she was married to the deceased or prove they had children. The Police abstract did not blame the defendant for the accident.

The Police officer who produced the Police abstract was not at the scene of the accident, he did not carry out any investigations. The body of the deceased and the vehicle were not at the scene.

The evidence of PW3 did not help the Plaintiff's case. He could not have been grazing cows and carrying manure and was at the road, he could not possibly have witnessed the accident.

He lied he saw the lorry hit the deceased, that police officers were at the scene, that he took the victim to hospital and used the deceased's brother's car.

PW1, PW2 and PW3 were clear the defendant did not cause the accident and the Trial Court rightfully decided the matter.

On the issue of claim under the Fatal Accident Act, the Court asked if the plaintiff wanted to amend the Plaintiff and they elected to proceed as the Plaintiff was.

The Respondent relied on the following cases;

LUCY NJOKI CHEGE (suing as legal and personal representative of the estate of) FRANCIS KARA WANAINA vs JAMES MACHARIA KUNGU T/A MARSH TRANSPORTERS & ANOR HCCC 239 OF 1998 and YUSUF ABDALLAH VS MOMBASA LINERS LTD HCCC 1700 OF 2002

ISSUES

The issues for determination are as follows;

Re-evaluation of the evidence on record and come an independent decision

Establish liability for the resultant accident between the Deceased and the respondent.

Determine whether a party may claim under Fatal Accidents Act when specifically not pleaded.

Assess quantum with regard general damages.

Assess special damages.

APPLICATION

As the first appellate court I am required to consider the evidence on record afresh and come to my own conclusion and inferences; See **SELLE vs ASSOCIATED BOAT CO.LTD [1968] E.A. 123.**

On Ground 1&2 of the appeal; that the deceased was to bear contributory negligence at a ratio of 40 % contrary to the evidence on record, I find the Plaintiff did not by her testimony prove negligence as set out in paragraph of the Plaint on the part of the defendant. She testified as to death of her husband arising from the accident with motor- vehicle KAH 804Y and produced the death certificate (*P.Exhibit 2*) She adduced evidence she was wife to the deceased and produced affidavit (PEX3) and indicated they contracted marriage under Kikuyu customary law. She gave names of the 3 children of the marriage and told the court, her late husband operated a matatu Reg. No KAP 670S and made about KSHS. 50,000/- a month. And supported the family. She spent KSH.13,000/- funeral expenses; produced receipt Kshs.7,000/= and 5,000/- (PEX6a &6b) She instructed an advocate and paid Kshs.15, 000/= (*P.Exhibit 7*) and obtained records from Registrar of Motor vehicles at Kshs.500/= (*P.Exhibit 8*).

PWII Patrick Ojwang, the Police officer who visited the scene of the accident. He filled and produced the Police abstract (*P.Exhibit 4*), he did not investigate the matter, he was not at the scene of the accident, he did not find victim and lorry at the scene the police abstract indicated (*PUI- pending under investigation*)

PW3 recalled on 10th April 2004 while he was grazing cows and planting napier- grass on the road reserve outside his home, as he waited to cross the road and wheel the wheel barrow he saw a milk lorry hit a pedestrian who was off the road on the left side as he was. The lorry hit rubble strips and swayed and he saw what he thought were clothes flying. He heard screams and realized it was a person. The lorry was KAH 804Y. He rushed and found the deceased alive and took him to Karuri Health Centre. He knew him and his family of his wife and 3 children as neighbours.

The Trial Court found the testimony of PW3 with regard to the accident wanting; as the court observed in the Judgment;

“It is obvious therefore that he cannot attest to the events immediately before the time of the accident. He may have seen the victim thrown off ground as he said he saw what he thought were clothes flying until he realized somebody had been hit. He cannot claim to have seen where the deceased was standing immediately before he was hit”

The Trial Court found that PW 3’s evidence proved the occurrence of the accident that eventually caused the deceased’s death but not who was at fault. Apart from witnessing the actual accident, the Trial Court found the issue of liability unresolved.

Taking into account that the Court of first instance had the opportunity to hear and observe the witness I would not fault this reasoning. In **PETERS vs SUNDAY POST LTD [1958] E.A. 424 pg 429;** The Court observed;

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of a judge who tried the case and who has had the advantage of seeing and hearing witnesses’

See also **EPHANTUS MWANGI &ANOR vs WAMBUGU [1983] 2KCA** at Pg100 where the court observed;

“The Court will however interfere where the finding is based on no evidence, or on misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did”.

I find the learned Magistrate evaluated the evidence correctly; the evidence was credible in proving on a balance of probability the accident occurred where the deceased was involved in an accident and hit by the defendant’s motor vehicle.

PWII the scene visiting officer confirmed that though he went to scene later, the deceased and the motor vehicle were not at the scene of the accident. Presumably, no statements were recorded, exhibits collected; road view or sketch plan drawn or charges preferred against the defendant. He produced the Police Abstract (*P.Exhibit 4*) that showed the matter was pending under investigation (PUI). Again the evidence was not instructive on liability.

In ANNE WAMBUI NDERITU (suing as administrator for the estate of GEORGE NDERITU KURIA vs JOSEPH JIPRONO ROPKOI & FOUR BY FOUR SAFARIS CO LTD. (C.A. 345 of 2000 OKUBASU, WAKI & GITHINJI JJA)

The Court observed;

“There is no doubt that an accident between the 2 vehicles on the Nyeri- Mweiga road occurred as stated by the 2 witnesses. In our assessment of the scanty evidence on record, both the lorry driver and motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame and apportion liability at 50/50”.

In the instant case, I will adopt the reasoning of the appellate Court, that from the record evidence of occurrence of the accident is sufficient whereas as to culpability is scanty; the record shows;

PW3 states;

“I saw a milk lorry hit a pedestrian who was off the road on the left side as me. The lorry hit rumble strips and swayed and then I saw what I then thought were clothes flying....”

It is difficult to apportion liability from the above testimony save to state if both the lorry driver in driving carefully and the deceased in keeping proper lookout; both were more careful on the road, then the accident would have been avoided.

I find that both parties liable for the accident. However, due to evidence of the vehicle swaying which seems to strongly suggest lack of proper control of the motor vehicle by the driver I would hold the driver slightly more liable than the deceased.

I have also taken into account the fact that the evidence by the Plaintiff was uncontroverted by evidence from the defendant; Plaintiff’s evidence proves on a balance of probability that the accident between the deceased and the defendant’s vehicle occurred and directly resulted in the deceased’s death.

On liability, in the absence of cogent evidence of liability, the scanty evidence assessment discloses liability by Plaintiff 40% and defendant 60%. I uphold the finding on liability arrived at by the learned but for reasons set out above.

On Grounds 3, 4 & 5 of appeal globally relate to the finding by the Trial Court that the appellant was not entitled to damages under the Fatal Accidents Act as the appellant did not pray for damages under the said Act.

The appellant stated that in Paragraph 1 and paragraphs 5, 6, & 7 of the Plaint disclose the claim and particulars of dependency under the Fatal Accident Act.

Paragraph 1 states;

“They bring this suit as the legal representatives of the estate of PAUL KARONGO IGOGO (deceased) on their own behalf and on behalf of the dependants of the deceased under the Fatal Accidents Act and on behalf of the estate of the deceased under the Law Reform Act.”

Paragraph 5;

“As a result of the injuries the deceased’s estate and his dependants have suffered loss and damage.”

Paragraph 6;

“The deceased was at the time of his death aged 45 years and of good health; he was a businessman and farmer; earning about Ksh. 50,000/- per month”.

Paragraph 7;

“The deceased was survived by the following dependants for whose benefit this action is brought and he used to support them financially to the tune of Kshs. 20,000/- per month”.

The Trial Court stated;

“Unfortunately damages under Fatal Accidents Act have not been pleaded in the prayers in the Plaintiff. It matters not that such evidence was led and adduced at the hearing. Law cannot be bent to suit a particular circumstance. The Court cannot move itself to what was not pleaded. It can neither presume the Plaintiff’s intended to plead the same. The most prudent thing the Plaintiff’s Counsel would have done was to move the Court for an amendment of prayers to include Fatal Accident Act”.

The Respondent in both oral and written submissions reiterated that the appellant is not entitled to damages under Fatal Accident Act as it was not specifically pleaded nor prayed for in the Plaintiff.

Secondly, the Respondent indicated that dependency ought to be proved yet proof of marriage, children of the marriage and deceased’s earnings were not proved.

I find the content of Paragraph 1 specifically refers to the claims brought under both the Law Reform Act and Fatal Accident Act.

Paragraphs 5, 6 &7 are pleadings in compliance of section 4 of the Fatal Accident Act; who can claim and on what basis;

With respect to the Trial Court’s finding; the totality of the pleadings in the body of the Plaintiff culminating with the prayer; ***‘Any other relief that this Honourable Court may deem fit to grant’*** suffices to assess damages under the Fatal Accident Act.

I am guided by the case of;

GREAT LAKES TRANSPORT CO (U) LTD vs KENYA REVENUE AUTHORITY 2009 EKLK
(WAKI, ONYANGO OTIENO VISRAM JJA) where the Court observed;

The Judge considered the ground of appeal in relation to non pleading for general damages. (and the Court did not consider the pleading in paragraph 8 of the amended Plaintiff.) The Counsel for the appellant conceded there was no specific prayer for general damages, but relied on the fact the claim was pleaded in the body of the Plaintiff, it was left to the Court to decide upon, it could not be ignored. The appellate Court set aside the order refusal to award general damages appellate pleaded in the prayers.

Therefore, in the instant case even if the Fatal Accident claim was not pleaded specifically it was introduced in the body of the plaintiff. In assessing damages under the Fatal Accident Act; dependency must be proved; PW1 testified as the wife to the deceased and produced an affidavit with her name and ID number. She testified they married under Kikuyu customary law. Although, she did not produce documents to prove the children of the marriage, PW3 testified he knew the deceased’s family, wife and 3 children. His evidence corroborated her testimony and both witnesses’ testimonies’ veracity tested through cross-examination and her evidence was not controverted as the defence did not offer any

evidence.

The respondent cited the following authorities;

LUCY NJOKI CHEGE (suing as the personal & legal representative of the estate of) FRANCIS KARA WANAINA VS JAMES MACHARIA KUNGU T/A MARSH TRANSPORTERS HCCC 239 OF 1998

YUSUF ABDALLAH (suing as the legal representative of the estate of Rukia Sukur Khasis) vs MOMBASA LINERS LTD HCCC1700 OF 2002 where, damages under Fatal Accident Act were denied due to lack of proof of dependency. In both cases there was no evidence of the accidents and proof of negligence and suits were dismissed. Assessment of damages was if the Plaintiff succeeded in proving negligence on the part of the defendant.

In the case of the Court observed;

MESHACK NJEMA ODONGO vs WEST KENYA SUGAR CO. LTD HCCA 18 2009

(S.CHITEMBWE. J)

“It is well established in law that a Plaintiff in fatal accident claims can claim damages under both Fatal Accident Act and also under Law Reform Act. All the Court has to do when making an award under Law Reform Act regard has to be made to the Fatal Accident Act”.

The grounds of appeal were that the Trial Court did not award damages under Fatal Accident Act because the appellant did not prove dependency to the deceased; no proof of marriage, the baptism cards produced had different names than those in the pleadings and the deceased’s income was not proved. The Trial Court did not include loss of expectation of life based on the deceased age, no award was made for lost years and the award was manifestly low.

The Court found that the Plaintiff proved on a balance of probability, the Plaintiff was wife to the deceased and children to the deceased respectively in line with Section 4 (1) of the Fatal Accident Act.

“Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and children of the deceased , whose death was so caused and shall subject to provisions of S7, be brought by and in the name of the executor or administrator of the person deceased....”

The Court assessed and awarded damages under Fatal Accident Act but took into account the award of damages under the Law Reform Act.

In evidence, PW1 testified she was married to the deceased and they had 3 children. She produced an affidavit of marriage (P.Exhibit 3). She did not offer any documents to prove the existence of the 3 children and dependency on the deceased. PW3 testified, he saw witnessed the accident, took the deceased to hospital and knew his wife and 3 children. This evidence corroborated the evidence of PW1.

The Respondent opposed the recognition of the children as dependants in the absence of proof of existence and dependency. I have considered the cited authorities with regard to the issue of dependency; namely, the **MESHACK** case above on assessment and award of damages under Fatal Accident Act on proof of dependency and income, Also in the case of ‘

AGNES BOSIBORI OGEA vs TEA RESEARCH FOUNDATION & JOSEPH MAINA MUTSYA [2006] eKLR (KIMARU J) the Court observed;

The Court considered the Plaintiff and 6 children, there was no documentary proof of marriage or existence and dependency of the children. The Court found oral evidence sufficient as the evidence was

not controverted and the Court recognized wife and children of the deceased, liability was apportioned at 100% against the defendant and a claim under Law Reform Act was not made by the Court.

In the instant case, this Court believes that the Plaintiff is the wife of the deceased; she obtained limited grant for the deceased's estate and properly filed suit as personal representative of the estate of deceased under Fatal Accident Act (Cap 32) and Law Reform Act (Cap.26) and the children are of the deceased as her evidence was corroborated by PW3 who knew the deceased and family. Her evidence was not controverted.

(In the instant case, this court considers 2 crucial issues; that if one claims damages under Law Reform Act then in assessing damages under Fatal Accident Act the court will have the other award in mind. Secondly, the Plaintiff was working as a secretary and made some income, she was not wholly dependent on the deceased; this impacts on the level of dependency.

The deceased was aged 45 years and would have taking into account the vagaries of life had a span of almost 15 years of active working life to 60 years. Therefore a multiplier of 12 would be reasonable in the circumstances. The amount used on the family was indicated at Ksh.20,000/- monthly. Taking into account tax deductions and personal expenses a reasonable figure would be Ksh.8, 000/=.

On Ground 6, the appellant produced legal fees receipt (*P.Exhibit 7*) for fees paid to advocates for filing a case for limited grant to pursue this suit under Fatal Accident Act. The legal fees were pleaded and proved by production of receipt and the limited grant issued to the deceased's widow on behalf of his estate. The Trial Court declined to award the payment of Legal Fees as it related to another case. With respect, the Court finds the Plaintiff entitled to these special damages; incurred to pursue limited grant used and produced in this case.

Ground 7 , the appellant claims the Trial Court did not assess the award under the Fatal Accident Act even if not awarded. This position is clarified in the case of;

JOHN WANAINA KAGWE vs HUSSEIN DAIRY LTD 2013 eKLR referred To

WILLIAMSON DIAMONDS LTD vs BROWN [1970] E.A.1

LAW J observed;

“It is always desirable, in a suit for damages for the judge to make a finding as to the amount to which he thinks the Plaintiff would be entitled if successful, even though he gives judgment for the defendant, Much time and expense can be avoided if this course is followed.”

Therefore the Trial Court should have assessed damages under Fatal Accidents Act even if not awarded.

In conclusion, this Court upholds the Trial Court's evaluation of evidence and reasoning on liability and quantum of damages under Law Reform Act and Ground 1& 2 of the Appeal are dismissed.

Ground 3, 4 &5 on assessment and award of damages under Fatal Accident Act; the Court vacates the Trial Court's decision and finds the claim pleaded and proved. The assessment and award under Fatal Accident taking into account the amount awarded under the Law Reform Act.

Ground 6 special damages at Kshs.15,000/- awarded

Ground 7, the assessment of damages ought to have been done even if not awarded.

The Plaintiff is entitled to costs in the Lower Court. Each party to bear its own costs of the appeal.

CONCLUSION/ FINDING

Taking into account the damages awarded under the Law Reform Act; the assessment is as follows;

LAW REFORM ACT

Pain & suffering Ksh. 10,000/=

Loss of expectation of life..... Ksh. 100,000/=

Less 40%..... Ksh. 72,000/=

Special damages..... Ksh. 10,000/=

Total Ksh. 92,000/=

FATAL ACCIDENT ACT

8,000/- x 12 x12 x2/3..... Kshs. 768,000/=

Less 40% contribution..... Kshs.306, 000/=

Balance payable..... Kshs.462, 000/=

COURT ORDER;

1. Appeal is upheld in Grounds 1 and 2 and is vacated in Grounds 3, 4, 5.
2. Under the Law of Reform Act – Ksh. 92,000/= upheld.
3. The claim under the Fatal Accident Act at 40% /60% liability
Ksh. 462,000/= for the appellant.
4. The claim for special damages Ksh.15, 000/= awarded.
5. Interest and costs to the appellant against Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2014

MARGARET MUIGAI

JUDGE

In the presence of:

Counsel for the Appellant.....

Counsel for the Respondent.....