



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 2 of 2008

DAHIR ADAN JIMALE.....1ST APPELLANT

A.S. SHEIKH TRANSPORTERS LTD.....2ND APPELLANT

VERSUS

PETTERSON KARIUKI MUTURI

(Suing as personal representative of

EDWIN NJIRU KARIUKI (Deceased).....RESPONDENT

(Being an Appeal from the Judgment and Decree of F.M. OMENTA Principal Magistrate Siakago in PMCC No. 15/2007 on 6/12/2008)

J U D G M E N T

DAHIR ADAN JIMALE & A.S. SHEIKH TRANSPORTERS LTD (1st and 2nd appellants) respectively were the defendants while PATTERSON KARIUKI MURI (respondent) was the plaintiff in the Siakago PMCC No. 15/2007. The respondent had sued for damages following the death of his son. He sued under both the Law Reform Act and the Fatal Accidents Act. The matter proceeded to hearing and the learned trial magistrate entered judgment in favour of the respondent in the sum of Shs.263,850/= after deducting 15% contribution. He also awarded costs to the respondent.

The appellants were dissatisfied and filed the present appeal citing the following grounds.

- 1. The learned trial magistrate wrongly exercised his discretion in awarding an amount of Kshs.140,000/= for loss of expectation which amount is inordinately excessive and not supported by law and evidence on record.***
- 2. The learned trial magistrate wrongly exercised his discretion in awarding an amount of Kshs.30,000/= for pain and suffering which amount is inordinately excessive and not supported by law and evidence on record.***
- 3. The learned trial magistrate erred in law in failing to take into consideration the award made under the Law Reform Act before assessing damages under the Fatal Accident Act.***
- 4. The learned trial magistrate erred in law and fact in failing to consider and/or disregarding the submissions and authorities that were filed on behalf of the appellants.***

5. ***The Judgment of the learned trial magistrate is bad in law and against the weight of evidence on record.***

Both counsels agreed to file written submissions which they did. In their submission Mr. Mithega for the appellants indicated that they abandoned ground 1 & 2 of the appeal. He therefore asked the court to consider that the learned trial magistrate did not take into account the award made under the Law Reform Act as he assessed damages under Fatal Accidents Act. He cited the case of

1. ***KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES VS LUBIA & ANOTHER [1987] KLR 30***

2. ***NAKURU HCCC NO. 393/1991 ZIPPORAH WANJIRU KAMAU VS JAMES G. WATHIGO & ANOTHER.***

Mr. Muriuki for the respondent in his submissions relied on the case of ***JOHN WAMBUA KILONZO VS THE ATTORNEY GENERAL MACHAKO HCCC NO. 82/91*** in asking the court to borrow leaf from Justice Mwera and decline to deduct the award under the Law Reform Act as the damages awarded were small. He further submitted that the learned trial trial Magistrate well considered the submissions and authorities that were submitted.

This is a first appeal and this court is enjoined to reconsider and reevaluate the evidence and arrive at its own conclusion bearing in mind the findings by the court below. I rely on the cases of

1. ***SELLE VS ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123***

2. ***SUMARIA & ANOTHER VS ALLIED INDUSTRIES LTD [2007] 2 KLR 1***

The brief facts of this case are that the respondent's son aged 6 years was knocked down by the 1st Appellant who was driving a motor vehicle registration No. KAW 944V Toyota Land Cruiser owned by the 2nd appellant. He died as a result. On 1/11/2007 a consent judgment on liability was entered in the ratio of 85:15 in favour of the plaintiff.

Damages were assessed. Which damages are no longer a contested issue as per the submissions of Mr. Mithega. Order 42 Rule 2 of the Civil Procedure Rules provides;

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed”.

A perusal of the record of appeal shows no certified copy of the decree herein. Even the original record does not contain the decree. Order 42 Rule 2 of the Civil Procedure Rules talks of a decree or order which is certified. The respondent did not however raise this in their submissions. I would still, based on several court of appeal authorities have dismissed this Appeal. However, considering that fact that the claim was based on a life lost and that justice must be done then the parties herein I have decided to use the original judgment.

The issue of contention as covered in grounds 3-5 is of the Law Reform awards not having been deducted as is required. The learned trial magistrate made the following awards

Law Reform Act

1. **special damages** - 350/=

2. **Loss of expectation of life** - 140,000/=

3. **pain and suffering** - **30,000/=**

Fatal Accidents Act

1. Dependency - **140,000/=**

The judgment was delivered on 6/12/2008. The principle has been that the same litigant ought not benefit under both Acts. And when the court assessing the damages under Fatal Accidents Acts it should take into account those under the Law Reform Act. Cases in point are

1. ***KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES VS LUBIA & ANOTHER (Supra)***
2. ***HUMPREY MUIGANA & ANOTHER VS ROBERT KIBIBIRI GICHUKI & ANOTHER NAKURU HCCC NO. 85 OF 1996***
3. ***MAINA KAMAU & ANOTHER VS CIVIL APPEAL NO. 148/1989.***
4. ***DAVIES VS POWELL DUFFRYN ASSOCIATED COLHERIES LTD [1942] ALL ER 647***

It is clear that the learned trial magistrate did not take into account the fact that he ought to have deducted the damages under the Law Reform Act from those under the Fatal Accidents Act.

The scenario presenting itself here is a very awkward one. The total damages under the Law Reform Act are Shs.170,350/= while those under the Fatal Accident Act are Shs.140,000/=. If the principle in the above cases was to be followed it would leave the respondent with Shs.30,350/=. This does not make sense at all and would cause an injustice to the respondent who actually lost his child aged 6 years.

The learned trial magistrate actually erred in failing to consider the submissions and the cited authorities. The principle that substantive justice must be seen to be done as Hon. Justice Mwera (as he then was) did in the case of ***JOHN WAMBUA KILONZO VS THE ATTORNEY GENERAL MACHAKOS HCC NO. 82/1991*** comes into play.

I will therefore allow the appeal and set aside the judgment of the lower court. I will substitute it with an award of Shs.140,000/ for loss of dependency plus special damages of Shs.350/=. There shall be no award under the Law Reform Act. Total damages is Shs.140,350/= less 15% contribution. The balance is Shs.119,297/50.

I therefore enter judgment for the respondent in the said sum of Shs.119,297.50 interest from date of judgment. The appellants get half of the costs of appeal.

Costs in the lower court to respondents.

DELIVERED, SIGNED AND DATED AT EMBU THIS 28TH DAY OF MAY 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Nyakeriga for Mr. Munene for Respondents

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