



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL NO. 123 OF 2010**

**MONICA KOROS:.....:APPLICANT**  
**VERSUS**  
**JAMES OMERO:.....:1<sup>ST</sup> RESPONDENT**  
**ANUR PARTNERS SAW MILLS:.....:2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This is an appeal from a suit filed in the Chief Magistrate's Court at Eldoret. The appeal was listed and proceeded for hearing on the 11<sup>th</sup> October, 2011.

The brief facts of CMCC Number 1201 of 2002 are that Jeremiah Tirop (deceased) aged 17 years was involved in a Road Traffic Accident which occurred on the 25<sup>th</sup> August, 1997 along the Eldoret - Kitale Road. The young man was a Form One Student and was in his second term when he succumbed to injuries sustained from the accident.

His mother brought an action as a beneficiary and dependant of the deceased. The claim was brought under the Law Reform Act (Cap 26) and the Fatal Accident Act (Cap 32) Laws of Kenya.

At the trial the mother gave evidence and also called one witness, a police officer. The Defence did not call any of the Defendants to testify but filed written submissions. Counsel for the Plaintiff also put in written submissions.

The Honourable Senior Principal Magistrate who was seized of the matter proceeded to strike out the plaintiffs' suit on the 6<sup>th</sup> July, 2010 on the grounds that the Plaintiff lacked capacity to institute the suit as she had not taken out Letters of Administration giving rise to this appeal.

There are (6) six grounds set out in the Record of Appeal as set out hereunder:-

- 1. THAT the Honourable Magistrate erred in law and in fact in striking out the appellants suit, purportedly on the ground that the same was a nullity and that the plaintiff had no locus standi to institute the suit in the subordinate court.**
- 2. The Learned Trial Magistrate erred in law and fact in finding that the Appellant needed Grant of Letter of Administration to institute a suit for dependency under the F.A. Act (Cap 32) of the Laws of Kenya.**
- 3. The Learned Trial Magistrate erred in Law and fact in failing to appreciate that no Grant of Letters of Administration is required to institute a suit for dependency under the F.A Act (Cap 32)**

**of the Laws of Kenya.**

- 4. The Learned Trial Magistrate failed to appreciate the nature of the plaintiffs claim.**
- 5. The Learned Trial Magistrate erred in failing to appreciate the Appellants written submissions.**
- 6. The Learned Trial Magistrate misdirected herself in all matters of law and fact.**

The appellants prayer was that the appeal be allowed and the subordinate court's judgment be set aside and this court do proceed to make finding on both liability and quantum.

On the 11<sup>th</sup> October, 2011 both counsel for the appellant and respondent were present and both argued the appeal.

Counsel for the appellant submitted that the plaintiff at paragraphs 8 and 11 of the plaint brought the suit for and on behalf of the dependants of the deceased Under the Fatal Accidents Act Cap 32. That Under the said Act it is not a requirement to obtain Letters of Administration before instituting the suit. Only a claim under the Law Reform Act requires Letters of Administration.

Counsel further submitted that it was erroneous on the part of the trial magistrate to strike out the plaintiff/appellant's suit on the grounds that she had no locus standi. He argued that even though the plaint was struck out the magistrate should have nevertheless gone ahead to make a finding on liability and quantum and propose the amount of damages that she would have awarded notwithstanding the fact of having struck out the suit.

Counsel annexed a list of three (3) authorities to support the appeal and urged the court to set aside the judgment of the subordinate court as the appeal had merit. Counsel requested the court to make a finding on liability and to award damages in favour of the appellant.

The Respondents' Counsel opposed the appeal and urged for its dismissal on the grounds that the appellants had not complied with sections 4, 7 and 8 of the Fatal Accidents Act when she filed the plaint in the subordinate court. In summary the appellant did not have the capacity to initiate the suit, Under the Fatal Accidents Act.

It was the Respondents prayer that the appeal be dismissed as the Learned Magistrate had not misdirected herself on the law by striking out the suit.

I have heard both counsel for the Appellant and Respondent and read their respective submissions. The issues for determination before this court are:-

- 1) Are Letters of Administration a pre-requisite for filing a claim under the Fatal Accidents Act Cap 32 Laws of Kenya.**
- 2) Did the appellant comply with Section 4, 7 and 8 of the Fatal Accident Act.**
- 3) Should this appellate court proceed to determine the issue of liability and award damages if, issues (1) and (2) are in the appellants favour.**

It is not in dispute that the appellant did not take out Letters of Administration before instituting the suit. The reason for the striking out of the appellants suit in the Lower Court was due to the lack of there Letters of Administration. I concur with Counsel for the appellant that the Learned Magistrate erred in Law and fact in striking out the appellants suit on the grounds that Letters of Administration are required to institute a suit for dependency Under Fatal Accident Act. Counsel for the appellant relied on the authority annexed to the list of authorities, that is **TRUISTIK UNION INTERNATIONAL & ANOR -VS- JANE MBEYU & ANOTHER CA 145/1990.** In this appeal the respondent/plaintiffs had filed a suit without any grant of Letters of Administration. In a five (5) bench the Court of Appeal held that the

Grant of Letters of Representation were only pre-requisite to commence an action for the benefit of the deceased estate under the Law Reform Act. The court went ahead to affirm the damages awarded to the Respondents therein Under the Fatal Accident Act.

Did the appellant comply with section 4, 7 and 8 of the Fatal Accidents Act, Cap 32. Section 7 allows a person other than an Administrator or Executor to bring an action provided it is in the name or names of that person as set out in Section 4 of the said Act. Section 4 identifies those persons as a spouse, parents or children of the deceased.

The deceased in this case was a student and had no wife nor any children but had a parent, the appellant herein whom he would have supported in future. I find that the appellant complied with Sections 4 and 7 of the Fatal Accidents Act.

At paragraphs 8 and 11 of the Plaintiff and I quote paragraph 8 of the same:-

**“..... the plaintiff is the mother of the deceased claiming for and on behalf of herself.....”**

I find that section 8 of the Act has been complied with the respondent had the full particulars of the mother from the Plaintiff filed and the nature of the claim is as set out in paragraph 11 of the Plaintiff.

I repeat that the deceased had no wife nor children and it was the mother who brought the action for her benefit and no other persons particulars needed to be provided.

It is not in dispute that upon striking out the suit the Learned Trial Magistrate did not address the issues of liability and quantum of damages nor propose the award that she would have made for damages.

**IN THE CASE OF MANCHESTER OUTFITTERS SUITING DIVISION LTD & ANOR - VS- STANDARD CHARTERED FINANCIAL SERVICES & ANOTHER CA 88/2000 - TUNOI, JA** (as he then was) said and I quote that:-

**“..... it is always desirable in a suit for damages for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled to if successful, even though he gives judgment for the defendant.....”**

Which brings me to the last issue of the appellate court assessing damages. It was held in the same case of **MANCHESTER OUTFITTERS.....**and I quote that

**“..... the general principle is that damages are assessed once and for all at the time of trial and that the appellant court should not assess damages that instead remit the case back for assessment of damages.....”**

For the reasons that I have stated, I will allow the appeal and set aside the judgment of the subordinate court dated the 6<sup>th</sup> July, 2010. I remit the case back to the subordinate court with directions that the subordinate court address the issue of liability and assess general damages under the Fatal Accidents Act for loss of expected dependency and to also award such sums for special damages as it deems fit.

The appellant shall have costs of this appeal.

**DATED & DELIVERED AT ELDORET  
THIS 15TH, DAY OF NOVEMBER, 2011**

**A. MSHILA  
JUDGE**