THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO.9 OF 2007

NASHON KYULWA.....1ST APPELLANT

DORCAS M. KYULWA .....2ND APPELLANT

[Suing as the legal representatives and the administrators of the estate of ALFRED MUTISYA NASHON DECEASED]

VERSUS

TOBIAS MUTUKU KISULE t/a SAJID HAULIERS LTD.....RESPONDENT

(Being an appeal from the Judgement of Mr. S. A. Okato, Senior Resident Magistrate delivered in Machakos CMCC No.927 of 2004 on 17th October, 2006)

JUDGMENT

The Appellants were the plaintiffs in a suit they filed against the respondents who were the defendants in Machakos CMCC No.972 of 204. In the suit, the appellants had sought to recover damages both general and special on account of the death of their son following a fatal road traffic accident which occurred on 28th October, 2001 along Nairobi-Mombasa road at Kyumvi area, Machakos involving the respondents' motor vehicles. The case was defended.

Hon. S. A. Okato, SRM heard the case and by a judgment delivered on 17th October, 2006 he held thus:

"On quantum and under the Law Reform Act, counsel proposed an award of KShs.20,000/- for pain and suffering and KShs.10,000/- for loss of expectation and relied on the case of James Gichuru Kuinjuru & another vs. Mainyo Investment Limited HCCC No.1681 of 1999 and Cecilia Rachier & Another vs. Florida Peter Raval HCCC No.2187 of 1998 and at Nairobi" which I have read.
The deceased herein died on the spot and for pain and suffering I award the plaintiffs KShs.20,000/- as proposed by counsel and for loss of expectation of life, I award KShs100,000/-. Again as proposed by counsel and on the strength of binding authorities afore quoted.

For loss of dependency under the Fatal Accident's Act counsel for the plaintiff proposed an award of KShs.1,100,000/-. I do not have the jurisdiction to make such an award and I decline to award the same.

Accordingly, and since funeral expenses were not pleaded as special damages, I refuse to award them and proceed to enter judgment as below:

Pain and suffering ***KShs.20,000/-***

Loss of expectation of life ***KShs.100,000/-***

KShs.120,000/-

Less 10% contribution ***KShs.12,000/-***

Final award ***KShs.108,000/-***

Costs be borne by the Defendant".

The appellants were appalled by the decision aforesaid. They felt that the said decision did not determine all the issues before the trial Magistrate. The decision did not dispose of the suit because he shied away from determining some issues allegedly for want of jurisdiction. The appellants therefore filed an application dated 25th October, 2006 in which they prayed that;

"***That the judgment entered on 16.08.2006 by this court in favour of the plaintiff be reviewed and or set aside and the suit be heard afresh before a court of competent jurisdiction***".

The application was premised on the grounds that the judgment was entered in favour of the appellants for KShs.108,000/- in respect of claims under Fatal Accidents Act and Law Reform Act. That the court found that it had no pecuniary jurisdiction to award the amount claimed under the ***Fatal Accidents Act***. The appellants would suffer substantial loss if the judgment given is not reviewed and set aside because the award is too little on the face of the record. Finally, they contended that the court should not have entered judgment after realizing that it had no requisite jurisdiction.

The application was opposed through grounds of opposition dated 9th November, 2006. The respondent took the view that the application was misconceived and an abuse of the due process of court and that the supporting affidavit was fatally defective and ought to be struck out.

In a reserved ruling delivered on 20th December, 2006 **S. M. Okato** dismissed the application holding thus:

"***The order for review or setting aside of the judgment, I delivered on 17.10.06, which the applicant is seeking is neither based upon discovering of new and important matter nor on account of some mistake or error apparent on the face of the record. I refused to make an award of KShs.1,100,000/- under the Fatal Accidents Act as proposed by the counsel for the plaintiff because I lacked the monetary jurisdiction to do so. In my view, want of jurisdiction as aforesaid extends to want of jurisdiction to entertain the application for review or setting aside of my judgment aforesaid. For this reason, I dismiss the application dated 25.10.06 with costs to the second defendant."***

That dismissal then triggered this appeal. 5 grounds were advanced in support thereof to wit:

"***1. The trial Magistrate erred both in law and fact when he dismissed the appellants' application dated 25.10.06.***

2. The Trial Magistrate erred both in law and fact when he found that he had no jurisdiction to review or set aside his judgment dated 16.8.06.

3. The Trial Magistrate erred both in law and fact and misdirected himself when he held that there was no error apparent on the record to warrant review of his said judgment dated 16.8.06.

4. The Trial Magistrate erred both in law and fact when he refused to review his judgment dated 16.8.06."

When the appeal came before **Kihara Kariuki J.** for hearing, parties agreed to canvass it by way of written submissions. Parties subsequently filed and exchanged written submissions. However, before **Kihara Kariuki J.** could craft and deliver the judgment he left the station on transfer. The task of doing so fell on my laps after the parties agreed that I should take off from where **Kihara Kariuki J.** had left.

I have carefully read and considered the written submissions and cited authorities. I have no doubt in my mind that the learned Magistrate gravely misdirected himself when he held that he had no jurisdiction to entertain the application. He had presided over the trial and made a decision that he was being requested to review. If a court has made a decision, how can it then lack jurisdiction to review such decision. The application before court was not to enter judgment but rather to review its own judgment. Had the application been that the

court enters judgment for KShs.1,100,000/- then the court would perhaps have been justified to decline such invitation on the account of pecuniary jurisdiction.

I also note that the question of jurisdiction was not canvassed before trial court. The claim for KShs.1,100,000/- on account of loss of dependency was raised in the written submissions of the appellants. I do not think that when a party proposes quantum of damages to court in his submissions, such proposal is binding to the trial court. It is a mere proposal. The trial court was at liberty to reject the same and make an award in consonance with its pecuniary jurisdiction. In any event, I cannot see the rational of learned Magistrate failing to make such an award. The suit was filed in the Chief Magistrate's court. I believe that there was a Chief Magistrate insitu with the necessary pecuniary jurisdiction to make such an award. Why could the learned Magistrate not refer the case to such Chief Magistrate. It appears to me that the learned Magistrate treated the case as though it had been specifically assigned to him to determine and nobody else. This was wrong.

The respondents in opposing the appeal have submitted that the application was brought under the then order XLIV rule 1 of the Civil Procedure Rules. Under the said provisions an order for review can only be entertained following discovery of new and important matter or evidence by the applicant which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. Secondly, it may be ordered on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The appellants' application did not fit in any of the above tenets. I think that this submission is misguided. Clearly, by the trial court refusing to award damages under Fatal Accidents Act allegedly for want of pecuniary jurisdiction on the basis of a mere proposal by counsel for the appellants, the trial Magistrate fell in to error. That is a mistake or error apparent on the face of the record, which the learned Magistrate should have sought to correct by allowing the application.

For the foregoing reasons, I find that the appeal has merit. It is allowed. The order dismissing application dated 25th October, 2006 is set aside. In substitution, I order that the application be and is hereby allowed as prayed. The appellants shall have the costs of the application as well as this appeal.

Dated, signed and **delivered** at Machakos, this **15th** day of **November**, 20**11**.

ASIKE-MAKHANDIA
JUDGE