REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 346 of 2006

MESHACK KAMAU (Suing as legal representative of

ESTHER NJERI KAMAU (Deceased)…….…. APPELLANT

VERSUS

EDWARD KINYANJUI GATHANDI…....1ST RESPONDENT

FRANCIS CHOMBA MWANGI……..2ND RESPONDENT

J U D G M E N T

This appeal arises from a suit which was filed at the Chief Magistrate's Court at Thika by Meshack Kamau on his own behalf and on behalf of the Estate of Esther Njeri Kamau (deceased). In the suit Meshack Kamau (hereinafter referred to as the appellant) sought general and special damages from Edward Kinyanjui Gathandi and Francis Chomba Mwangi (hereinafter referred to as the 1st and 2nd respondents). The suit arose from an accident involving the 1st respondent's motor vehicle registration No. KAN 479L in which the deceased Esther Njeri Kamau (hereinafter referred to as the deceased) suffered fatal injuries. The respondents filed a joint defence in which they denied the plaintiff's claim and demanded strict proof. The respondent further contended that the appellant's suit as filed was fatally defective.

During the trial, the appellant and one Francis Mwangi Mbau testified. The evidence adduced in support of the appellant's case was as follows: -

On the 27th January, 2003, the deceased a little girl then aged about 5½ years was walking beside the road when she was knocked down by the 1st respondent's vehicle. Francis Mwangi Mbau (Pw2) who was nearby witnessed the accident. He saw the deceased land 7m away from the point of impact and the respondent's vehicle stopped 15m away. The appellant, who is the father of the deceased, received information about the accident. He went to the hospital where the deceased was. Later the deceased died while still in hospital. The appellant produced the death certificate. He also produced the police abstract of the accident.

The 1st respondent and one PC Raphael Mwaka testified on behalf of the respondent. He explained that he was operating his motor vehicle as Matatu and he learnt of an accident involving the motor vehicle. His motor vehicle was not damaged nor did anybody die in the accident. PC Raphael Mwaka produced a

police file showing that there was an accident reported on 27th January, 2003 involving motor vehicle KAN 479 and the deceased. He explained that nobody was charged as the cause of accident was said to be the child abruptly crossing the road.

In her judgment, the trial magistrate dismissed the appellant's suit contending that the suit was not properly before the court as the appellant had not obtained letters of administration for the Estate of the deceased. Being dissatisfied, the appellant has brought this appeal raising 6 grounds as follows: -

(1) The learned trial magistrate erred in law and fact by holding that it was mandatory for the appellant to obtain the grant of letter of administration to maintain an action under the Fatal Accidents Act Cap 32 of the Laws of Kenya thereby making a wrong decision.

(2) The learned trial magistrate erred in law and fact by ignoring the provisions of Sections 4 and 7 of the Fatal Accidents Act, Chapter 32 of the Laws of Kenya thereby reaching a wrong decision.

(3) The learned trial magistrate erred in law and fact by disregarding the appellant's submission thereby arriving at a wrong decision.

(4) The learned trial magistrate erred in law and fact by holding that a legal representative must have obtained the grant of letter of administration.

(5) The learned trial magistrate erred in law and fact by holding that the appellant's suit was improperly before the court.

(6) The learned trial magistrate erred in law and fact by dismissing the plaintiff suit with finality.

Counsel for the appellant has submitted that Section 7 of the Fatal Accidents Acts allows a person other than an administrator to file the suit. He cited ***HCCC No.1319 of 1992 Evans Muthaiti Ndiba vs Father Rino Menengello & Another***, in which the court held that a claim under the Law Reform Act filed by legal representative can only be sustained when the letters of administration were obtained before the filing of a suit whilst the claim under the Fatal Accidents Act can be brought without the plaintiff obtaining Letters of administration provided he is a dependant under Section 4 of the Fatal Accidents Act. Counsel for the appellant claimed that the evidence adduced before the trial magistrate was clear that the appellant was the father of the deceased and that the suit was brought for his benefit. Counsel for the appellant also relied on ***HCCC.No.183 of 1992 Milka Nduku Mutinda vs Josephat Kariuki Mbatia***, in which a claim by a widow of the deceased filed before letters of administration were procured, was allowed under the Fatal Accidents Act only. It was therefore contended that the appellant had the capacity to bring the suit under the Fatal Accidents Act without the Letters of Administration. It was further submitted that the deceased having been a minor of 5 years and 3 months, no contributory negligence could be attributed to her. Finally it was contended that the trial magistrate erred in failing to assess the general damages. The court was therefore urged to set aside the order of dismissal, find in favour of the appellant and assess general damages.

For the respondent it was submitted that the judgment of the lower court was proper as the appellant did not have capacity to bring the suit. It was maintained that under Section 4 of the Fatal Accidents Act, granting of letters of administration was necessary before a suit can be maintained. It was contended that the appellant having failed to take out letters of administration within 6 months, his action was not maintainable. It was submitted that Section 4 of the Fatal Accidents Act, can only apply where there is direct evidence of dependency. It was contended that the deceased having been only 5 years and a few months, she had no income. It was further submitted that there was no evidence of the deceased possible earnings.

Section 7 of the Fatal Accidents Act states as follows: -

"***If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months***

after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator."

It is clear from the above provision that an action can be maintained under the Fatal Accidents Act without letters of administration being issued, provided, the action is brought by a "person for whose benefit the action could have been brought" by an administrator or executor of the deceased if letters of administration were issued.

Section 4 of the fatal Accidents Act, identifies a person for whose benefit the action could have been brought as follows:

4(1) 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 so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deduction the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

In this case, the appellant did testify that he was the father of the deceased and therefore as per Section 4(1) of the Fatal Accidents Act he qualifies to be "a person for whose benefit the action is brought". It matters not that he was not an actual dependant of the deceased as that is not the criteria provided under Section 4(1) of the Fatal Accidents Act. What is material is the relationship between the deceased and the appellant and whether it is one of those named.

Order VII Rule 4(1) of the Civil Procedure Rules states as follows: -

"***Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises."***

According to the plaint the appellant brought the suit as a legal representative of Esther Njeri Kamau (deceased). Paragraph 1 of the plaint states that the plaintiff is suing for and on behalf of Esther Njeri (deceased), whilst under the particulars provided pursuant to the statute (Presumably particulars of the person or persons for whom and on whose behalf the action is brought as required by Section 8 of the Fatal Accidents Act), the appellant is indicated as the father of the deceased. It is obvious that the language in the pleadings is rather wanting as the appellant is suing for and on behalf of the ***Estate*** of Esther Njeri Kamau (deceased). Nevertheless, it is evident that the suit is brought by the appellant in a representative capacity for his own benefit and also for the benefit of the Estate of the deceased under the Fatal Accidents Act only. There is no claim under the Law Reform Act. Indeed, no claim would have been maintainable under the Law Reform Act as no letters of administration have been issued. However, as stated above, the action was maintainable for the benefit of the appellant under the Fatal Accidents Act. There is no contradiction between Order VII Rule 4(1) of the Civil Procedure Rules and Section 7 of the Fatal Accidents Act. All that is required is an averment showing the capacity in which the appellant has brought the suit and this is evident from the plaint.

I find that in dismissing the appellant's suit, the trial magistrate misapprehended the law and therefore applied wrong principles. Accordingly, I set aside the judgment of the trial magistrate.

I have carefully evaluated and reconsidered the evidence which was adduced before the trial magistrate. Pw2, Francis Mwangi Mbau witnessed an accident in which the deceased was knocked down by a vehicle which the witness only identified as a Nissan. The appellant did not witness the accident but produced a police abstract report which identified the vehicle which knocked the deceased as KAN 479L Toyota Hiace. The evidence of the defence witness PC Raphael Mwaka (Dw2) confirmed that there was an accident involving motor vehicle KAN 479L with the deceased Esther Njeri Kamau. The 1st respondent also confirmed that there was an accident involving his vehicle. Although he claimed that no one was injured in the accident, the 1st respondent did not witness the accident. I find that there was ample evidence that the deceased was knocked down by motor vehicle KAN 479L. The evidence of the eye witness (Pw2) was that the vehicle hit the deceased when she was off the road beyond the white line on the left. He maintained that the child was knocked off the road and thrown off about 7 metres away. The evidence of the defence witness (Dw2) was that the police investigation file indicated that the child was knocked down when she crossed the road abruptly. The basis for this conclusion was however not availed to the court. In any case even assuming that the child did cross the road abruptly, as a matter of law, being a child of 5½ years, no contributory negligence can be attributed to her. The case of ***Bashir Butt vs Uwais Ahmed Khan (1988) 1 KAR 1 as applied in Civil Appeal No. 23 of 1997 Edward Muriga through Stanley Mubisa Muriga vs Nathaniel David Schulter & Another*** is a case in point.

I find that in the circumstances of this case there was sufficient evidence that the 1st respondent's motor vehicle was being driven at an excessive speed and that the 2nd respondent failed to apply brakes or to control the motor vehicle causing it to knock the deceased. The respondents were therefore fully liable for the accident.

As regards general damages, only a claim for loss of dependency under the Fatal Accidents Act is maintainable. No submission was made to this court by the appellant's advocate with regard to quantum in that regard. In the lower court the case of ***Grace Wairimu Mwangi vs Joseph Mwangi Gitundu HCCC No.162 of 1994*** in which a global sum of Kshs.70,000/= was awarded for loss of dependency, was relied upon. In this case, the deceased having been a child of the tender age of 5½ years, it is difficult to estimate with accuracy what kind of life she would have led and of what help she would have been to her father. In the circumstances, it is difficult to identify a figure as an income or multiplier for purposes of assessment of damages. Nonetheless, whether the deceased would have been employed or not, it is fair and reasonable to assume that she would have offered some assistance, monetary or otherwise to her father as is ordinary in the African setting. In the circumstances of this case, a global award would be appropriate. The sum of Kshs.70,000/= which was awarded in the case of Grace Wairimu Mwangi provides an appropriate guide. Taking into account the element of inflation I would award a sum of Kshs.100,000/= to the appellant as general damages for loss of dependency.

For the above reasons I would allow this appeal, set aside the judgment of the lower court and substitute it thereof with a judgment in favour of the appellant on liability at 100%. I would further award the appellant Kshs.100,000/= as general damages for loss of dependency. I further award costs of this appeal and costs in the lower court to the appellant. Those shall be the orders of this court.

Dated and delivered this 24th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Jessie Kariuki for the appellant present

Advocate for the respondent absent