REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Appeal 16 & 17 of 2004

GABRIEL RUGIRI……..…..…..…….1ST APPELLANT

PETER KARIUKI MACHARIA……...…….2ND APPELLANT.

VERSUS

ERASTUS SIMIYU BUTALA……...…...…….RESPONDENT.

J U D G M E N T.

In a judgment delivered on 27th September, 2004, the learned trial magistrate noted that the issue of liability arising from the accident which gave rise to the case before her, had been determined in KITALE HCCC NO. R4 of 1998.

The High Court had, in that case, apportioned liability at 30:70 as between the 1st appellant and the 2nd appellant herein. Consequently, when the case went for trial, before the learned trial magistrate, she made it clear that the only issue for determination, before her, was that of quantum.

In that regard, the trial court awarded to the respondent herein, the sum of Ksh. 419,760/= in respect of loss of dependency; and a further sum of Ksh. 70,000/= in respect of loss of expectation of life. She also awarded to the respondent, the costs of the suit on the ratio of 30:70, as between the first and second appellants, respectively.

However, the appellants felt dissatisfied with the decision of the trial court, hence this appeal.

In order to have a better understanding of the issues raised on the appeal, the appellants first pointed out that the respondent had brought the original suit, (the one from which this appeal arose), in his capacity as the administrator to the estate of **JAMIN MAUKA WANYONYI (DECEASED**)

It is common ground that the respondent was the uncle to the deceased, who at the material time was traveling as a fare paying passenger in a motor vehicle registration number KAC 065 K. The said vehicle was involved in an accident on 9th July, 2005, resulting in the death of Jamin Mauka Wanyonyi, from the injuries which he had sustained in the accident.

When the respondent sued the 1st appellant herein, he indicated that he was doing so on behalf of BRIGID NANGILA, the mother to the deceased, as well as on his own behalf. The respondent described himself and the mother of the deceased as dependants of the deceased.

However, the 1st appellant herein, who was the sole defendant in the suit, denied the alleged dependency.

Having given consideration to the evidence which was tendered, the learned trial magistrate held that the respondent was not a dependant as envisaged by section 4 (1) of the Fatal Accidents Act.

The trial court then went ahead to hold that the mother of the deceased was a dependant, and in that respect she was awarded Ksh. 419,760/=. It is with that award that the appellants have taken issue, in this appeal. It is the appellants' contention that the mother was not a dependant. Their reason for so saying was that dependancy was a matter of fact, to be proved by evidence; but which was not so proved in this case.

According to the appellants, the respondent did not ever testify about the support which the deceased gave to the mother, during his lifetime.

Indeed, the appellants emphasized the fact that the mother to the deceased had left him when he was 7 years old, and that she never went to see him thereafter, until he met his death.

The appellants faulted the learned trial magistrate for holding that because the deceased was un-married, he must have been helping his mother. Such a presupposition was said to have found no evidential backing.

For those reasons, the appellants asked the court to allow the appeal, and to set aside the award of Ksh. 419,760/=. The appellants also sought costs of the appeals, as well as the costs before the trial court.

In response to the appeals, the respondent first pointed out that nowhere in the judgment which was being challenged had he been awarded any money. As far as he was concerned, the money which was the subject matter of the appeal had been awarded to mother of the deceased.

In my understanding, that submission was directed at Ground No. 1 in the 2nd appellant's memorandum of appeal.

Perhaps at this stage it becomes necessary to point out that each of the appellants filed their respective appeals, separately. Thereafter, the said appeals were consolidated, and a supplementary record of appeal was filed, pursuant to an order of this court. In the said supplementary record of appeal, the first appellant is Gabriel Rugiri, who had been the defendant in the original suit; whilst the second appellant was Peter Kariuki Macharia, who had been the third party in the original suit.

In the second appellant's memorandum of appeal, his ground numbered 1, reads as follows;

"***1. <u>THAT</u> the learned trial magistrate***

erred in law and fact in awarding loss of dependency to the plaintiff yet the plaintiff was not a dependant as envisaged under section 4 (1) of the Fatal Accidents Act."

In my reading of the judgment, I find that the trial court had made a clear finding that an "Uncle", such as the plaintiff was, did not fall within the realm of "parent" as envisaged in section 4 (1) of the Fatal Accidents Act. It was for that reason that the court went ahead to award, to the mother, the sum of Ksh. 419,760/=, which it had calculated as dependancy.

The said award was expressed in the following manner, at page 2 of the judgment;

"***I'd assess dependancy at Ksh. 6,996/=***

x 12 x 15 x 1/3 = 419,760/= which goes to the deceased's mother."

Upto that stage, there can be no doubt that that sum was awarded to the mother of the deceased, as opposed to the uncle. Therefore, it would appear that the respondent was right to have faulted the 2nd appellant for asserting that he, (the 2nd appellant) had been awarded the sum for dependancy.

However, one cannot lose sight of the fact that at the tail-end of the judgment the learned trial magistrate went on to state as follows:-

"***I therefore enter judgment for the plaintiff against the defendant (30%) and 3rd party (70%) in the following terms;***

Loss of expectation of life -Ksh. 70,000/=

Loss of dependancy - Ksh. 419,760/."

As the foregoing constitutes the conclusion of the judgment of the trial court, that begs the question whether the court did not actually award to the plaintiff, that which it had already found to be awardable to the mother of the deceased.

The respondent submitted that the learned trial magistrate had applied the correct legal principles, in awarding judgment in favour of the mother to the deceased.

Indeed, the failure by the mother to testify in court was attributed to her inability to attend court, due to the assertion that she was indisposed.

I have carefully perused the record of the proceedings but did not find any reference to the mother being unable to attend the trial because she was indisposed during the time when the case was being heard.

According to the evidence tendered by the respondent herein, the mother of the deceased had been involved in an accident in February 1995; which was more than nine years before the date when the respondent testified in court. Therefore, I find no basis for the respondent's contention that the failure by the mother of the deceased to testify at the trial had been reasonably explained. Indeed, I found no explanation at all for the said failure.

As regards the appellants' submission that the mother of the deceased would have been the best witness in relation to her alleged dependancy, the respondent submitted that there was no legal requirement that a dependant had to testify in order to prove his own dependancy.

Whereas there may be no legal requirement that a dependancy had to testify about his own dependancy, I hold the considered view that it is the person who was the alleged recipient of the benefits who would be best suited in testifying about the said benefits. However, that would not preclude other persons, who had knowledge of the dependency, from testifying about the same.

The bottomline in all this remains, as was held by the Hon. Lady Justice Ang'awa, in **MUSA ALULWA VS. THE HON. ATTORNEY GENERAL & ANOTHER, NBI HCCC NO. 1597 OF 2000;**

"***The plaintiff in evidence must prove dependency and that the dependants relied on the deceased for their upkeep through his employment."***

In that particular case, the learned judge declined to make any award for dependency, as there had been no evidence to show how the children were dependant on the deceased. In arriving at that decision, the court observed that whereas the children were said to have been dependant on the deceased, they lived with his mother.

To my mind, that scenario is comparable to that prevailing in the appeal before me, in which the mother to the deceased lived in Narok, while the deceased was resident at Wamuini, Kitale. Furthermore, the

mother to the deceased is said to have left the deceased when he was 7 years old.

In those circumstances, did the respondent herein adduce evidence to prove the dependency of the mother to the deceased?

In the case of **JOSEPH M. NGALA VS. BERNARD NDUSYA & ANOTHER, NBI HCCC NO. 857 OF 1996**, the Hon. Mr. Justice A. G.A. Etyang held that the wife to the deceased had deserted him some two years before he died, and was thus not a dependant.

Applying a similar yardstick to this case, I find that unless there was specific proof of the dependency of the mother, who had not seen the son for about twenty-five years, it was not right for the learned trial magistrate to hold, as she did, that;

"***The deceased was unmarried and there was no way he could not assist his mother."***

In this case, the plaintiff appears to have first testified that the deceased was helping the mother. But he then went on to say that the deceased did not even know the mother.

As those two statements appear contradictory, whilst they were made back to back, I decided to check the original hand-written records, to ascertain whether there was an error in the typed record of appeal. At page 28 of the hand-written record, I found that the plaintiff was shown as having said;

"***He was not assisting the mother. He did not even know her."***

However, the first "not" word above was then cancelled, and against the cancellation, the learned trial magistrate appended her signature.

In effect, I verified that the record of appeal did reflect what was on the original records. That position is further confirmed from the judgment, wherein the trial court stated;

"The plaintiff had said at first that the deceased did not assist his mother but he changed, saying he did assist her."

Notwithstanding that position, I cannot but continue reiterating that just because the deceased was unmarried was not reason enough to justify the conclusion by the trial court, to the effect that there was no way he could not assist the mother.

Even then, the fact that one was in a position to help another, would not necessarily imply that he did provide help to the said other person.

Upto this stage, the indications are that the decision to award the mother to the deceased a sum of Ksh. 419,760/= on account of dependency, was unsustainable. But then the respondent threw in a spanner in the works. He submitted that the appellants had not lodged any competent appeal before the High court.

The basis for that contention was that whereas the judgment in issue was for Ksh. 494,760/=, the Decree against which the appeal herein had been lodged, was for Ksh. 347,832/=.

In answer to that submission, Mr. Kiarie, advocate for the first appellant explained that the Decree in issue had been drawn up by the court, as is the normal practice before the magistrate's courts. Therefore, although he conceded that the figures appearing on the decree do not tally with the judgment, he submitted that that should not invalidate the appeal. In his view, the error by the court should not warrant the striking out of the appeals.

On the other hand, Mr. Kidiavai, advocate for the second appellant contended that there was no error on the decree. His explanation was that the decree herein was drawn in respect of the award against the 3rd party to the original suit, against whom liability had been assessed at 70%.

However, Mrs. Munialo, advocate for the respondent herein, was not impressed with the two explanations. She reiterated that the appeal had been lodged against a Decree of the magistrate's court. As that decree was not before this court, learned counsel asked me to dismiss the appeal.

By virtue of the provisions of O.XLI rule 1A of the Civil Procedure Rules, a certified copy of the decree or order appealed against, is to be filed with the memorandum of appeal.

A decree is defined at section 2 of the Civil Procedure Act, as;

"***The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 ……..***

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."

Whereas a judgment is said to be appealable notwithstanding the fact that either the decree in pursuance thereof may not have been drawn up or that it may be incapable of being drawn up, one cannot conceivably argue that where a decree had been drawn up incorrectly, such a decree was nonetheless a formal expression of the judgment.

Accordingly, where the decree was at variance with the judgment which is supposed to give rise to such a decree, the appellant would have to own up to the fact that he could not be appealing against the Decree, when the decree did not incorporate the material aspects of the judgment.

By virtue of section 65 (1) of the Civil Procedure Act;

"***Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court –***

(a) ……

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact.

(c) …….."

Inasmuch as an appeal is supposed to lie from a decree, if such a decree as drawn, was not in accordance with the judgment, there would be no doubt that the appeal would be incompetent.

The 2nd appellant explained that the decree herein, had been drawn in relation to the 3rd party only, against whom 70% of the liability had been attributed.

A perusal of the Decree herein does not have any indication that it was only in relation to the third party. And in any event, the decree arising out of a judgment should be composite, even if within its body the liabilities attributable to any parties thereto have been apportioned in varying degrees.

In the event, I find that the decree annexed to the memorandum of appeal herein is not an accurate expression of the judgment delivered by the learned trial magistrate. Accordingly, the appeal before me is incompetent. It is therefore struck off, with costs to the respondent.

It is so ordered.

Dated and delivered at Kitale this 4th day of June, 2007.

FRED A. OCHIENG.

JUDGE.