



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 43 of 2003

JOSEPH WACHIRA MAINA.....1<sup>ST</sup> APPELLANT

TRACOM COMPANY.....2<sup>ND</sup> APPELLANT

VERSUS

MOHAMMED HASSAN.....RESPONDENT

JUDGMENT

The respondent, Mohamed Hassan, sued the appellants in his capacity as the administrator of the estate of Ibrahim Sheikh Noor – deceased (*hereinafter referred to as the deceased*) seeking to be paid damages on account of the death of the deceased which occurred on the 12<sup>th</sup> of August 1995, when motor vehicle registration number KAD 079T which the deceased was travelling as a fare paying passenger, collided with motor vehicle registration number KAC 095Z driven by the 1<sup>st</sup> appellant and owned by the 2<sup>nd</sup> appellant as a result of which the deceased sustained fatal injuries. The respondent blamed the appellants for negligently driving the said motor vehicle and therefore causing it to collide with the motor vehicle where the deceased was a fare paying passenger. The respondent pleaded for the estate of the deceased to be compensated in damages as a result of his death under **the Law Reform Act** and **the Fatal Accidents Act**.

The appellants filed a defence denying that they were responsible for the accident that resulted in the death of the deceased. Instead the appellants blamed the driver of motor vehicle registration number KAD 079T for causing the said accident. The appellants denied that the estate of the deceased had suffered any loss or damage. Before the hearing of the case however, the respondent and the appellant agreed by consent to apportion liability between themselves at the ratio of 20:80 in favour of the respondent and against the appellants.

The issue that was therefore left for the determination of the trial magistrate was the damages to be paid to the estate of the deceased. The respondent testified before the trial magistrate and closed his case. The appellants chose not to offer any evidence to controvert the evidence adduced by the respondent. After considering the evidence adduced and the submissions made the trial magistrate awarded the respondent on behalf of the estate of the deceased the sum of Kshs 720,000/= under **the Fatal Accidents Act** and the sum of 99,000/= under **the Law Reform Act**. The respondent was further awarded a sum of Kshs 150/= being the proved special damages. The appellants were aggrieved by the said decision of the trial magistrate and have appealed to this court.

In their memorandum of appeal, the appellants raised four grounds of appeal challenging the decision

of the trial magistrate in assessing the said damages payable to the respondent. They were aggrieved that the trial magistrate had made duplicate awards to the respondent under **the Law Reform Act** and **the Fatal Accidents Act** without taking into account the award made under **the Fatal Accidents Act**. They were aggrieved that the trial magistrate had awarded a manifestly wrong dependency ratio under **the Fatal Accidents Act**. They faulted the trial magistrate for making an award under **the Fatal Accidents Act** when the respondent had not proved his case to the required standard of proof. They were finally aggrieved that the trial magistrate had ruled that the deceased earned an income whereas there was no evidence that he earned such an income assessed by the trial magistrate. They therefore urged this court to set aside the award of the trial magistrate and substitute it with an appropriate award of this court.

At the hearing of the appeal, Mr. Murimi Learned Counsel for the appellants basically reiterated the contents of the memorandum of appeal. He submitted that the award made under **the Law Reform Act** should have been deducted from the award made under **the Fatal Accidents Act**. He submitted that the trial magistrate had failed to properly apply the law by taking into account the awards made under the **two Acts**. He argued that the dependency ratio that ought to have been applied by the trial magistrate was either  $\frac{1}{3}$  or  $\frac{1}{2}$  as the deceased was a bachelor at the time of his death. It was the appellants' contention that the respondent had not proved that the deceased was in the cattle trade prior to his death to the required standard of proof.

He further submitted that the respondent had not proved that the alleged dependants of the deceased depended on the deceased to enable the subordinate court to make the said award. He submitted that in the circumstances of this case, the trial magistrate ought to have awarded the respondent a global award of between Kshs 20,000/= and Kshs 60,000/=. In the absence of any evidence adduced by the respondent, the appellants urged this court to apply the minimum wage applicable in 1995 to determine the amount to be used to determine the payment to be made to the deceased's estate under **the Fatal Accidents Act**. He urged the court to allow the appeal with costs.

Mr. Kamere, Learned Counsel for the respondent submitted that the appellants had not laid any basis in law to make this court interfere with the decision arrived at by the trial magistrate when he assessed the damages payable to the deceased's estate. He submitted that the award made by the trial magistrate was neither inordinately high nor inordinately low as to amount to an erroneous assessment of the damages payable to the deceased's estate. He submitted that the true position of the law is that an award made under **the Law Reform Act** could only be taken into account and not deducted when an award was made under **the Fatal Accidents Act**.

On the issue of the dependency ratio to be applied, he argued that the respondents had established that the deceased had dependants who depended on him. He submitted that there was proof that the deceased earned more than Kshs 5,000/= per month from his business and therefore the sum of Kshs 5,000/= that was adopted by the trial magistrate to determine the amount payable to the deceased's estate under **the Fatal Accidents Act** was reasonable. He submitted that the multiplicand of 18 years adopted by the trial magistrate was also reasonable. He therefore urged this court to dismiss the appeal with costs.

I have considered the rival submissions made by the parties to this appeal. I have also re-evaluated the evidence adduced before the trial magistrate's court as I am required to by the law. The issue for determination by this court is whether the trial magistrate correctly applied the applicable principles of the law in assessing the damages payable to the estate of the deceased. The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of **Ali -vs- Nyambu t/a Sisera stores [1990] KLR 534** at page 538 quoted with approval the principles laid down by the Privy Council in **Nance -vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601** at page 613 where it held that:

***“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages,***

***applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collieries Ltd. [1941]AC 601.”***

In this appeal, three issues have been raised by the appellant for determination by this court. The first issue is whether the respondent adduced sufficient evidence to establish that the respondent earned a monthly income at the time of his death. The respondent testified that he used to be in the cattle trade business with the deceased whereby they used to make a profit of about Kshs 100,000/= per month. However the respondent did not produce documentary evidence in form of either bank statements or any other document for instance licences which could have established that they indeed conducted such a business that made them to earn the said sum of Kshs 100,000/= per month.

The trial court was not satisfied with the evidence adduced by the respondent and proceeded to find that the deceased earned a sum of Kshs 5,000/= per month. The appellants did not offer any evidence to controvert the evidence adduced by the respondent. As it were, the only evidence on record was that which was adduced by the respondent. In the absence of any evidence by the appellant to controvert the evidence of the respondent, this court cannot interfere with the finding of the trial magistrate as regard the monthly income that the deceased earned. The challenge by the appellants of the decision of the trial magistrate on this score lacks merit and is therefore disallowed.

The second issue for determination is the complaint made by the appellants that the trial magistrate applied the wrong dependency ratio in calculating the amount which is due to the deceased’s estate under **the Fatal Accidents Act**. I have considered the evidence which was adduced by the respondent and I am inclined to agree with the submissions made by the appellants. Apart from stating that the deceased was unmarried and was supporting his parents, brothers and sisters, no evidence was adduced to support the respondent’s testimony that the deceased offered such support. It is clear from the evidence adduced that the deceased was a bachelor and used the substantial part of his income that he earned to support himself. Dependency is a matter of fact which has to be established in evidence. In that regard therefore the trial magistrate erred in adopting a dependency ratio of  $\frac{2}{3}$ . There was simply no evidence to support the finding by the trial magistrate that the deceased supported his parents and siblings to the extent of  $\frac{2}{3}$  of his income. I will therefore reassess the dependency ratio to be a  $\frac{1}{2}$ .

As regard the multiplicand of 18 years applied by the trial magistrate I find nothing in the submissions made by the appellant that would make me disagree with the trial magistrate on the issue of the multiplicand to be applied. In the premises therefore I will similarly adopt the multiplicand of 18 years in assessing the damages to be paid to the estate of the deceased under **the Fatal Accidents Act**. I therefore set aside the award made by the trial magistrate under this head and assess the damages to be paid to the deceased’s estate under **the Fatal Accidents Act** to be;

***Kshs 5,000 x 18 x 12 x  $\frac{1}{2}$  = Kshs 540,000/=***

The third challenge by the appellants of the decision of the trial magistrate was on the issue of whether the trial magistrate took into account the award made under the **Law Reform Act** when he made the final award under **the Fatal Accidents Act**. In this case, the subordinate court awarded the respondent the sum of Kshs 99,000/= under **the Law Reform Act**. This was in addition to the award made under **the Fatal Accidents Act**. The respondent has submitted that the trial magistrate applied the correct principles of the law when he made the said two awards.

On this point I am inclined to agree with the submissions made by the appellants. It is trite law that the courts of law have to take into account an award made **under the Law Reform Act** when making an award under the **Fatal Accidents Act**. Ondeyo J. in **Humphrey Muigana & Anor –vs- Robert Kibibiri Gichuki & Anor Nakuru HCCC No. 85 of 1996 (unreported)** held that;

***“The court of appeal in Maina Kamau & Anor –vs- Josephat Muriuki Wangondu & Anor CA No. 148***

*of 1989, citing with approval the House of Lords decision in the above case (Davies –vs- Powell Duffryn Associated Collieries Ltd. [1942]All ER 647) observed that:- ‘the rights conferred by Section 2(5) of the Law Reform Act (Cap 26) Laws of Kenya, for the benefit of the estates of the deceased persons are stated to be in addition to and not in derogation of any rights conferred on dependants of deceased persons by the Fatal Accidents Act. This does not mean that damages can be recovered twice over, but if damages recovered under the Law Reform Act, devolve on the dependants, the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act’.”*

In the present appeal it is clear that the trial magistrate did not take into account the fact that he ought to have deducted the damages awarded under **the Law Reform Act** and not add it to the award made under **the Fatal Accidents Act**. In the circumstances of this case therefore, I will set aside the award of Kshs 99,000/= made to the estate of the deceased under **the Law Reform Act**. In the premises therefore the respondent is awarded the sum of Kshs 540,000/= under **the Fatal Accidents Act** only. The said amount shall be reduced by 20% being the agreed contribution by the deceased’s estate. The general damages awarded to the deceased’s estate shall therefore be Kshs 432,000/=. The respondent proved special damages of Kshs 150/=.

I noted that the respondent had already paid the sum of Kshs 82,000/= to the estate of the deceased. The damages due to the deceased’s estate is therefore Kshs 350,000/=. The said amount of Kshs 350,150/= shall attract interest at the usual court rates from the 18<sup>th</sup> of February 2003 when the judgment was delivered by the subordinate court until the payment in full of the said damages awarded. The respondent shall have the costs of the suit in the subordinate court. The appellants shall however have half of the costs on appeal since they were partially successful in their appeal.

It is so ordered.

**DATED at NAKURU this 23<sup>rd</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**