



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 121 OF 2019

JOHN MATHEKA NGOLI & KATUU MATHEKA NGOLI (Suing as legal representatives &
Administrators of the estate of **ISAAC MUSEMBI MATHEKA** (DECEASED)..**APPELLANTS**

- VERSUS -

KYOGA HAULIERS LIMITED.....**1ST RESPONDENT**

FISCAL MULONDA.....**2ND RESPONDENT**

(Being an Appeal from the Judgement of the Honourable C. C. Oluoch, delivered on the 28.8.2019 at Mavoko in SPMCC No. 117 of 2018)

BETWEEN

JOHN MATHEKA NGOLI & KATUU MATHEKA NGOLI (Suing as legal representatives &
Administrators of the estate of **ISAAC MUSEMBI MATHEKA** (Deceased)).....**PLAINTIFFS**

- VERSUS -

KYOGA HAULIERS LIMITED.....**1ST DEFENDANT**

FISCAL MULONDA.....**2ND DEFENDANT**

JUDGEMENT

1. Vide pleadings in the trial court as amended, the appellants sued as the legal representative of the Estate of the deceased minor who was said to have died from a road traffic accident that occurred on the 29th day of May, 2017 where the deceased had been a pedestrian along an unknown road/path and who was hit by motor vehicle registration number KCJ 999T Prime mover that was registered in the names of the 1st respondent and being driven by the 2nd respondent. The appellants pleaded negligence and *res ipsa loquitor* and that the deceased's family had suffered special damages of Kshs 25,180/-. It was pleaded that the death of the deceased caused his estate and his dependents pain and suffering. The appellants sought special damages, general damages for pain and suffering, loss of expectation of life and loss of dependency as well as costs of the suit plus interest.

2. In their joint defence, the respondents denied negligence, denied loss and damages, denied the applicability of vicarious liability and pleaded that the accident was wholly caused and or contributed to by the negligence of the deceased.

3. The parties consented on liability at the ratio of 80: 20 against the respondents and the matter was set down for assessment of damages. During the hearing, the 1st appellant testified as Pw1 and he told the court that he was a brother to the deceased who was then not married; that the deceased was a 29-year-old working as a barber and who would earn Kshs 15,000/- to Kshs 16,000/-per month. He tendered as evidence *inter alia*, the death certificate, receipts and copy of records. On cross examination, he told the court that he had no proof of income of the deceased or proof that he was a barber. On reexamination, he stated that the death certificate of the deceased indicated that he was a barber.

4. The appellants' case was closed and so was the respondents' case.

5. Vide judgement delivered by the trial court on the **28th day of August 2019**, the learned magistrate awarded the appellants total damages of **Kshs. 173,500** being **Kshs. 50,000.00** for pain and suffering, **Kshs. 100,000.00** for loss of expectation of life and **Kshs. 23,500.00** for special damages. The learned trial magistrate did not make an award on loss of dependency. The Appellants were dissatisfied with the award on quantum and as such preferred this Appeal vide a Memorandum of Appeal dated 24.9.2019 and filed in Court on 25.9.2019. It was counsel's position that the quantum under the Fatal Accidents Act i.e. dependency was inadequate hence he sought that the court makes an assessment of general damages and what was given by the trial court be set aside.

6. The appeal was canvassed vide written submissions. Learned counsel for the appellant took no issue with the **KShs. 100,000.00/-** awarded for loss of expectation of life. It was submitted that the award for pain and suffering ought to be increased to **Kshs 100,000/-**. However, the appellant argued that the award or lack thereof made under the Fatal Accidents Act be set aside and substituted with an award of **Kshs 3,480,000/-** using the minimum wage of Kshs 15,000/- as at the time of death multiplied by 31 years and 1/3 ratio. Counsel placed reliance on the decision in **Wilson Nyamai Ndeto & Another v China Wu yi Ltd & Another [2017] eKLR**. In respect of special damages, an amount of **Kshs 25,180/-** was proposed. Curiously, counsel indicated that the consent on liability was at the ratio of 70:30 and yet the record indicates differently. Counsel challenged the learned magistrate for finding that dependency was not proven yet there was a chief's letter dated 19th June, 2017 that listed the dependents of the deceased including his mother. In placing reliance on section 4 of the Fatal Accidents Act, it was submitted that the mother of the deceased ought to be considered as his dependent.

7. In reply to the submissions made by counsel for the appellants, learned counsel for the respondents in their submissions urged the court to take note that the appellants were bound by their pleadings and therefore the failure to plead that the deceased's mother was a dependent meant that the court could not award damages for loss of dependency. It was pointed out that the appellants pleaded that they as brothers of the deceased were his dependents; the court was invited to consider the case of **Aphia Plus Western Kenya & Another v Mary Anyango Kandenge & Anor (2015) eKLR** where it was stated that the persons pleaded as dependents did not qualify to be dependents and that failure to plead that the mother of the deceased was a dependent meant a claim under the Fatal Accidents Act could not be sustained. It was therefore the argument of counsel that the appeal be dismissed because the appellants are not entitled to be dependents and they could not depart from their pleadings to have the mother of the deceased be awarded loss of dependency yet it was not pleaded. The court was urged to deduct the award for loss of life from that of loss of dependency and cited the case of **Kemfro v A.M. Lubia & Another (1982-1988) KAR 727**.

8. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

9. Having considered the rival pleadings in the trial court, the evidence therein, the memorandum of appeal and the respective submissions of counsel, the issues for determination are whether the trial court erred in failing to award damages under the Fatal Accidents Act for loss of dependency and whether there been a case made for disturbing the award of the trial court.

10. On the first issue, the appellant's case is that the court ought to have seen the chief's letter and noted that the deceased's mother was a dependent therefore should have awarded an amount for loss of dependence; the respondents' case is that the deceased's mother was not listed in the pleadings and therefore the appellants cannot depart from what they pleaded. I have considered the provisions of the Fatal Accidents Act which was meant to cure a deficiency in the common law where the cause of action did not provide for dependents of a deceased person. **Section 4(1) of the Fatal Accidents Act** provides as follows;

Every action brought by nature 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 be brought by and in the name of the executor or administrator of the person deceased.....]

11. It was therefore the duty of the appellants to prove that the mother of the deceased was his dependent. I have looked at the appellants' testimony and there is no attempt to even mention their mother and therefore by throwing the chiefs letter to the court and expecting the court to argue their case for them by finding that the deceased's mother was a dependent without creating a foundation for such a finding by leading evidence in that direction, the appellants could not expect the court to find that they met their burden of proof. In any event, the chief's letter dated 19.6.2017 does not even mention the deceased's mother on the list; it only mentions his brothers. I find that the court did not err in its finding that dependency was not proven.

12. On the 2nd issue, the law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The respondents have asked this court to make a deduction of the award under the Fatal Accidents Act from that under the Law Reform Act. This was the discussion in the case of **Mombasa Maize Millers Limited v Chrispine Asoyo (Suing As A Personal Representative/ Administrator Of The Estate Of Martina Asoyo Akinyi) [2018] eKLR** where the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

"The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

13. I find no merit in the Respondent's counsel's argument and decline to make the deduction as proposed.

14. It was proposed by the appellant's counsel that the award for pain and suffering ought to be increased to **Kshs 100,000/-**. Comparable awards by courts for pain and suffering are in the range of 20,000/- to 50,000/-. See **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR**. From the evidence on record, it is not clear if the deceased died on the spot or if he died in hospital. I see no reason to interfere with the award made by the trial magistrate.

15. In respect of special damages, an amount of **Kshs 25,180/-** was proposed up from the Kshs 23,500/- that was awarded by the trial court. The receipts on record are Kshs 15,000/-(post mortem) + Kshs 8,500/-(the mortuary fee) + Kshs 550/- (search fee). I have not seen the receipt for Kshs 1,130/- claimed as letters of administration. Therefore, the award of special damages is increased to Kshs 24,050/-. The increment has been brought about by the inclusion of Kshs 550/ in respect of receipt for copy of records. The rest of the awards remain undisturbed.

16. Save to the extent under paragraph 15 above, the other grounds of appeal are dismissed for lacking in merit.

17. In the result, the Appellant's appeal partly succeeds to the extent as noted in paragraph 15 above. As there has been a minimal success in the appeal, I find it appropriate that the Respondents be awarded half costs in this appeal while the appellant will have full costs in the lower court.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF JUNE, 2021

D. K. KEMEI

JUDGE