



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CIVIL APPEAL NO. 29 OF 2018**

**1. MARGARET NYAMBURA.....APPELLANT**

**2. PAUL MUNYA MBURA..... APPELLANT**

**VERSUS**

**PETER MURIGI GITAU.....RESPONDENT**

**(Being an Appeal from the judgment of Hon. M. Kurubu, R.M. in the Senior Resident Magistrate's Court at Kandara Civil Case No. 135 of 2017 delivered on 21<sup>st</sup> June, 2018).**

**JUDGMENT**

1. This Appeal arises from a judgment delivered on 21<sup>st</sup> June, 2018 in the Senior Resident Magistrate's Court at Kandara Civil Case no. 135 of 2017. The Plaintiffs who are the Appellants herein had sued the Respondents, the Defendants therein for the following reliefs:

- a. General damages under the Law Reform Act.
- b. Damages under the Fatal Accidents Act.
- c. Costs.
- d. Interests on a & b above.

2. The Appellants had brought the suit as the Administrators of the estate of the late Jeniffer Wairimu Mburu and as Dependants of the Estate of the Deceased. It was alleged in a plaint filed on 3<sup>rd</sup> August, 2017 that the deceased was on or about 3<sup>rd</sup> October, 2016 travelling as a passenger in motor vehicle registration No. KBM 567A owned by the Respondent when the Respondent and/or his servants, agents or driver negligently drove the said motor vehicle causing it to overturn as a result of which the deceased sustained fatal injuries.

3. The general damages were sought on behalf of the Appellants who were a daughter and son of the deceased respectively and their five other siblings. In addition to general damages, the Appellants also sought special damages in the sum of Kshs. 16,160/= .

4. The Respondent failed to enter appeared or file defence consequent which the Appellants through their Counsel requested for entry of Interlocutory Judgement under Order 10 Rule 4 of the Civil Procedure Rules 2010. The Request for Judgment was dated 16<sup>th</sup> October, 2017 and filed on 19<sup>th</sup> October, 2017.

5. On 14<sup>th</sup> December 2017, the Court duly entered judgement against the Respondent in default of appearance and filing of defence. Consequently, the hearing against the Respondent proceeded by way of formal proof.

6. The Respondent called only one witness, namely the 1<sup>st</sup> Appellant. In the judgement of the learned trial magistrate the suit was dismissed on account that the Appellants did not prove their case on a balance of probabilities, specifically that liability was not established. That gave rise to the instant Appeal.

7. In a Memorandum of Appeal dated 27<sup>th</sup> June, 2018 and filed on 29<sup>th</sup> June, 2018 two **grounds of Appeal were raised namely:**

a. **That the learned trial magistrate erred in law in dismissing the suit when there was already interlocutory judgement in place.**

b. **The learned magistrate erred in law by failing to assess general damages and dismissing suit for lack of proof.**

8. From the onset, it is important to state that the Respondent needed not be served with the Appeal because the proceedings in the Court below proceeded ex-parte. The onus of this court in the appeal is simple, as stated in the grounds of Appeal which is to determine whether the learned trial magistrate erred in dismissing the suit when there was already an interlocutory judgement in place and whether she erred in failing to award the general damages she had assessed.

9. Learned counsel, Miss Njiru for the Appellants premised her submission on the two grounds of Appeal. She emphasized that the trial Court's duty once interlocutory judgement had been entered was to proceed and assess damages. By failing to do so, she contended, the Court had entertained extraneous matters thereby arriving at a decision to dismiss the suit. She sought reliance in **Nairobi High Court Civil Case No.205 of 2015 - Kenya Broadcasting Corporation vs National Authority for Campaign Against Alcohol and Drug Abuse** in which the case of **Patel versus East African Cargo Handling Services EACA (1974)** was cited. The Court in the latter case stated "*The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.*"

10. In this regard, Miss Njiru submitted that the learned trial magistrate misdirected herself by proceeding to assess a certain amount of money and subsequently dismissing the suit stating that liability had not been proved.

11. Counsel also took issue with the learned trial magistrate's decision to subtract the sum assessed under the Law Reform Act. In her view an award under the Law Reform Act should be in addition to, and not in derogation of, a sum awarded under the Fatal Accidents Act. Her prayers were therefore, that the Court finds for the Appellants for the sum assessed both under the Law Reform Act and the Fatal Accident Act.

## **DETERMINATION**

12. Order 10 Rule 6 of the Civil Procedure Rules, 2010 provides as under:

**"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, any dependant fails to appear the Court shall, on request in Form Number 13 of Appendix A, enter interlocutory judgement against such dependant, and the Plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be".**

13. My interpretation of the above rule is that once an interlocutory judgement has been entered the Court's duty is simply to proceed to assess damages awardable to the Plaintiff, bearing in mind though that he/she bore the burden of demonstrating the Defendant's link to the causation of the accident.

14. Thus, at this point, the onus of this Court is to determine whether the learned trial magistrate erred in dismissing the suit upon holding that the Appellant did not establish the nexus between the Respondent and the accident.

15. The Court must emphasize one undeniable fact; that in as much as the Appellants' obligation at formal proof hearing was to adduce evidence for assessment of general damages, this did not lessen their(Appellants) burden to demonstrate how the damages would be arrived at and the justification for that. More so, bearing in mind the cardinal principle that he who alleges must prove in cases where negligence is alleged. This was aptly set out by the Court of Appeal in the case of **East Produce (K)Limited v Christopher Astiado Osiro, Civil Appeal No.43 of 2001** which held that:

**"It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991) ..... in which the Court held that:**

**'There is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the Defendant where the claim is based on negligence.'**

16. A look at the proceedings attest that it is the 1<sup>st</sup> Appellant who testified for the Plaintiffs' case. Her brief testimony was as follows:

**"My name is Margret Nyambura Mburu. I am the Plaintiff. I obtained letters of administration for Jennifer Wairimu my mother. Me and my brother are co-administrators. I adopt this statement.**

**Mrs. Njiru: The statement filed on 3/8/17 adopted. On 3/8/17 I filed a list of documents. I wish to produce the originals.**

**Demand letter - Exh. 1**

**Original ad litem grant - Exh. 2**

**Death certificate – Exh. 3**

**Police abstract - Exh.5**

**Burial Permit – Exh. 6**

**Post mortem report – Exh. 4**

**Letter from the chief – Exh. 7**

**We spent money 6160. The receipt for the grant – Exh.8**

**I don't have funeral receipts. I can't get them.**

**My mother had 7 children. We are all grown-ups we seek compensation for losing our mother.”**

17. From that brief evidence it is clear that the Appellant adopted her statement filed on 6/7/2017 as evidence. Looking at the statement it only bears four paragraphs recorded as follows;

**“We Margaret Nyambura Mburu and Paul Munyu Mburu of Saba Saba, Murangá state as follows; -**

**We are the legal representatives of the late Jeniffer Wairimu Mburu. At the time of death, she was 63 years old.**

**On 30<sup>th</sup> October, 2016 while the late Jeniffer Wairimu Mburu was travelling with other relatives as passengers in motor vehicle registration KBM 567A, a Toyota Town Ace, the said vehicle was involved in a tragic accident along Saba-Saba – Githembe Road and as a consequence Jeniffer Wairimu Mburu died on the spot, she was taken to Murang'a County mortuary.**

**We came to know about the accident through a phone call from our cousin.**

**At the time of the accident, the deceased was a passenger in a private car.**

**We blame the Defendant for causing the accident.”**

18. From the above excerpt it is clear that the Appellants did not allude to how the accident occurred and more so to what extent the Respondent could be apportioned the blame for causing the accident. Interestingly at Paragraph 6 of the plaint dated 6/7/2017 it is alluded that the accident in which the minor was injured was caused by the negligent driving of motor vehicle registration No KBM 567A by the Defendant and/or his servant, or driver or agent as a result of which the minor was knocked down and sustained injuries.

19. The Particulars of the negligent driving of the aforesaid motor vehicle were spelled out at paragraph 6 of the plaint namely;

- a. Driving at an excessive speed in all the circumstances.
- b. Failing to swerve, brake, stop or in such a way so as to control the motor vehicle to avoid the accident.
- c. Failing to exercise due care and attention.
- d. Failing to adhere on the Highway traffic rule.

20. From the oral evidence and the statement of the Plaintiff nothing close to how the accident occurred was asserted. Further, it was never evidenced who was driving the subject motor vehicle; either the Defendant or his servants, agents or driver as pleaded in the plaint. As earlier observed by this Court, there can never be liability without fault. It begs therefore, how the Plaintiffs sued the Respondent yet they could not demonstrate how he was linked to the vehicle said to have caused the accident or how he participated in the accident. Simply, the Appellants failed to unpack the alleged acts of negligence attributed to the Respondent as pleaded.

21. It is again said that the burden also lay with the Appellants to demonstrate the acts of negligence on the part of the Respondent. Clearly, from the statement of the witness it was only stated that the vehicle was being driven along a particular road. Nothing about the negligent manner in which the vehicle was been driven was alluded to. The law is well settled at Section 107 of the Evidence Act that; the burden of proof lies with;

**“(1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must proof that those facts exist.**

**(2) When a person is bound to proof to the existence of any fact it is said that the burden lies on that person.”**

22. It is further clear from Section 108 of the Evidence Act that: **“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by either side”.**

23. Therefore, I need not to belabour to emphasize that the Appellants failed to discharge their burden in demonstrating how the Respondent was linked to the causation of the accident. No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the meaning of the word “*Interlocutory*” it merely means on the interim. What this implies is that the Court had *prima facie* entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But at the formal proof hearing it was incumbent upon the Appellants to demonstrate how the accident occurred, who caused the accident and to what extent liability for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed.

24. In fact, a look at both the oral evidence in Court and the Appellants’ witness statement are a clear testament of the casual manner in which the Plaintiffs’ case was conducted. A glimpse of it attest that the Plaintiff, more so her Counsel assumed that merely rescued an interlocutory judgment had been entered, there was no need to demonstrate how the Respondent was liable. Hence, the casual manner in which the evidence was recorded and adduced. Far from this assumption because the law is spelt out in clear black and white that the Plaintiffs still bore the onus of discharging their burden of proof of their liability against the Respondent. They failed to unpack this obligation. In this regard therefore, I find no fault in the learned trial magistrate’s finding that the Court “cannot proceed to hold liable a party whose capacity and involvement in the alleged accident is not proved”.

25. At this juncture I find no reason to delve into what award of general damages was suitable to grant. I only underscore that PW1 adduced no evidence on how and why general damages under the Fatal Accidents Act was claimed. This was left to the Counsel in her submissions to shed light to the Court the grounds on which the Court would award such a sum. In her submissions, she stated that the deceased was 63 years old and was expected to work up to 75 years of age. She pegged her earning at a sum of Ksh. 7,000/= whilst applying a multiplier of 7. What is clear in the evidence of the witness is that she did not inform the Court how the deceased earned her living and therefore the basis on which Kshs. 7,000/= was arrived at.

26. Furthermore, it is also trite that evidence cannot be adduced by way of submissions. Submissions serve the purpose of emphasizing the evidence already on record. To this extent, I also entirely agree with the learned trial magistrate that the Appellants did not discharge their burden in establishing the damages awardable to the Plaintiffs and other dependants under the Fatal Accidents Act.

27. My view is that PW1’s evidence was adduced in extremely causal manner merely on assumption that since an interlocutory judgement had been entered, it followed that the Court would automatically enter a judgement on damages submitted on. What the Plaintiffs forgot is that they had a duty of adducing evidence specifically on their relationship with the deceased, how much they depended on the deceased and how much the deceased earned for her living. I need not therefore, delve into how much was awardable under this head.

28. Although I have found that no sum was awardable under the Fatal Accidents Act it is important that I comment on whether damages under the Law Reform Act should be awarded in addition to, and not in derogation of, a sum under the Fatal Accidents Act. This was in view of the fact that although the learned trial magistrate assessed the amount that would have been awardable under the Law Reform Act she proceeded to deduct the amount from the total sum assessed. Although she did not give reasons for doing, this Court can assume that the court was resisting to award double compensation.

29. In the case of **Kemfro Africa Limited (Supra)** the Court of Appeal delivered itself as follows;

**“6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.**

**7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.**

**8. The words ‘to be taken account’ and ‘to deducted’ are two different things. The words in Section 4 (2) of the Fatal Accidents Act are ‘taken into account’. The 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.”**

30. The law is that the awards under the two Acts are made for the benefit of the estate. The Courts have an obligation, though discretionary to discount or consider the awards given under the Law Reform Act where parties also claim under the Fatal Accidents Act.

31. Section 2(5) of the Act provides that:

**“(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom.”**

32. In **Mary Njeri Murigi –Vs- Peter Macharia & another [2016] e KLR Aburili J** noted that:

**“In the United Kingdom, the applicable law and principles are common law jurisprudence as adopted and applied by Kenyan Courts. Thus, under the Law Reform Act, the Courts are entitled to award damages for pain and suffering by the deceased and loss of expectation of life. The correct mode of assessing damages under the Law Reform Act is that the net**

**benefit inherited by the dependants under the Law Reform Act must be taken into account in respect of damages awarded under the Fatal Accidents Act because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased under the Law Reform Act**” (emphasis mine).

33. In **Kemfro Africa** case (supra) the Court held that if the net benefit from both the Law Reform Act and the Fatal Accidents Act is for the benefit by the same dependants, it ought to be discounted to avoid double benefit that the law does not allow. However, **Section 1(5) of the Law Reform** (Miscellaneous provisions)1934 confers all rights under the Act for the benefit of the estate of deceased's persons in addition to, and not in derogation of any rights conferred on the dependants of the deceased by the **Fatal Accidents Act**.

34. In **Pleasant View School Limited vs. Rose Muthu Kithoi & another [2017] eKLR** Kamau, J held as follows:

i. “Any damages under the Law Reform Act in respect of loss of expectation of life and pain and suffering are benefits to the deceased’s estate. Section 2(5) of the Law Reform Act Cap 26 (Laws of Kenya) is clear that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act. This Court could not see any other interpretation of that provision as the same was not ambiguous.

ii. “..... that the Court was fully aware that there seems to be two (2) schools of thought on this issue. However, this Court therefore associated itself fully with the holdings of Emukule J, Karanja J and Mativo J in the cases of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another[2013] eKLR**, **Richard Omeyo Omino vs. Christine A. Onyango [2009] eKLR** and **David Kahuruka Gitau & another vs. Nancy Ann Wathithi Gitau & another [2016] eKLR** respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal Accidents Act but merely need to be taken into account.”

35. Emukule, J (as he then was) in the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another** (Supra) rendered himself as follows: -

“...These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above...”

36. My understanding of the above decisions, more so, the **Kemfro** one, is that the Court was categorical that a party can sue for damages both under the Law Reform Act and the Fatal Accidents Act. What it was quick to clarify is that the words “to be deducted” must be distinguished from the words “taken into account” referred to under Section 4(2) of the Fatal Accidents Act. It also clarified that what should be taken into account should not necessarily be deducted. Further, that it is sufficient and prudent that a judgment of the lower Court should indicate that in reaching the figure awarded under the Fatal Accidents Act, the trial Court bore in mind what was awarded under the Law Reform Act.

37. I also understand the Court of Appeal in the **Kemfro case** to be stating that in awarding damages under the Law Reform Act, the Court should not award such high damages as may be construed to amount to a double compensation in that the Plaintiff would still be benefitting from an award under the Fatal Accidents Act. In that regard therefore, the learned trial magistrate erred in deducting the amount awarded under the Law Reform Act from the award under the Fatal Accidents Act, more so without justifying the same. I am also of the view that the amount assessed as damages under the Law Reform Act would have been a reasonable award had it been proved and cannot be considered to be tantamount to a double compensation merely because an award under the Fatal Accidents Act was given.

38. I emphasize that the principle set out is that the awards must be capped to the minimum or the awards made under the Law Reform Act must be considered. The trial magistrate failed to note that in making the deduction she had considered the amount under loss of expectation of life that was entered.

39. Be that as it may, the argument advanced by Miss Njiru that the learned trial magistrate erroneously deducted the sum assessed under the Law Reform does not much assist this court since the sum assessed under the Fatal Accidents Act could not stand in the absence of proof of dependency.

40. In sum, I come to the unfortunate conclusion that, notwithstanding once again that this Appeal was uncontested the Appellant failed to establish the link of the Respondent to the causation of the accident.

Accordingly, I find the Appeal without merit and the same is dismissed with no orders of costs.

**DATED, DELIVERED AND SIGNED AT MURANG’A THIS 4<sup>TH</sup> DAY OF SEPTEMBER, 2020.**

**G.W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

1. Miss Njiru for the Appellants.

2. No appearance for the Respondent.