REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 122 OF 2014

LOICE MUCHEYI MASOSO (suing as the administrator/legal representative

of the estate of the late JOSPEH MASOSO – Deceased).....APPELLANT

VERSUS

MAURICE N. KARANJA….....…1ST RESPONDENT

NGAO KILATA.....2ND RESPONDENT

(*Being an appeal from the Judgement and Decree of Kakamega Senior Resident Magistrate's Court in Kakamega Civil Case Number 406 of 2009 read and delivered on 10th September 2014*)

JUDGMENT

1. The appellant, having been dissatisfied with the decision of the trial court aforementioned lodged this appeal on 16th October 2014 seeking *inter alia* that the appeal herein be allowed and that this court finds liability in favour of the appellant and assesses damages payable to the appellant on the following grounds:

a) That the learned magistrate erred in law by failing to take into account that a claim under Fatal Accident Act, Cap 32, Laws of Kenya, does not require any grant of representation at all;

b) That the learned magistrate erred in fact and in law in treating the appellant's evidence superficially and subsequently dismissing the appellant's case;

c) That the learned trial magistrate erred in fact and in law when he failed to find and hold the respondents liable for the fatal injuries sustained by the deceased;

d) That the learned trial magistrate erred in fact and in law in failing to take into account the entire evidence and submissions tendered by the appellant;

e) That the learned magistrate erred in fact and in law in looking at the appellant's submissions superficially and subsequently dismissing the Appellant's meritorious case;

f) That the learned trial magistrate erred in law and in fact for failing to hold the respondents liable even when the respondents had been charged in a traffic case;

g) That the learned trial magistrate erred in failing to award any sum at all contrary to the law; and

h) That the learned trial magistrate erred in law and/or fact when he only considered evidence of the respondents' witness.

2. The appellant had sought general damages, costs and interests, arising out of an accident that occurred on or about the 8th day of September 2000 involving motor vehicle registration mark and number KAM 508J, owned by the 1st Respondent, in which the late Joseph Masoso (hereinafter the deceased) was a fare paying passenger, and motor vehicle registration number KTQ 444 owned by the 2nd respondent. The appellant claimed that the accident occurred along Haile Selassie Avenue, Nairobi, when the respondents' agents, servants, employees, and/or drivers so negligently drove, managed and controlled the said motor vehicles that they caused them to violently collide thereby causing fatal injuries to the deceased.

3. The appellant alleged that the said accident was occasioned by the sole negligence of the respondents and held them jointly and severally liable. She relied on the doctrine of r*es ipsa loquitor*, the tort of negligence and brought the instant action under the Fatal Accidents Act and Law Reform Act, Cap 26, Laws of Kenya. The Appellant stated that the deceased was 31 years old at the time of his death, was in good health and worked as a financial administrator earning a monthly salary of Kshs. 20,000.00 per month. The appellant added that the deceased would probably have worked for another 24 years and that he was survived by three dependants, being herself, and their two children, aged 8 and 10 years, respectively.

4. The respondents filed their defence denying the contents of the plaint therein. Interestingly, the appellant filed a notice to withdraw the suit whereas the 1st respondent filed an application to dismiss the suit for want of prosecution. A third party notice was issued to one Dhanji Vagji & Co Limited, who failed to enter appearance or file any response.

5. In his judgment delivered on 10the September 2014, the learned trial magistrate held that the appellant lacked the requisite capacity to commence proceedings on behalf of the deceased as she presented a limited grant *ad colligenda bona* as opposed to a limited grant *ad litem* which would have been more appropriate. The learned trial magistrate proceeded to strike off the suit with costs to the 1st respondent.

6. It is the said judgment that forms the basis of the instant appeal.

7. As a first appellate court, this court has a duty to examine the record of the lower court on matters of both law and facts, and to subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and to test the veracity of their evidence and demeanor. This position is stated in Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which set outs the role of a first appellate court which is to' … re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' That position has been restated by the Court of Appeal in a number of cases. In *Peter M. Kariuki vs. Attorney General* [2014] eKLR, for example, the court stated:

> *"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui vs. Republic, (1984) KLR 729 and Susan Munyi vs. Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."*

8. The issues to be determined are whether the appellant had the requisite legal capacity to institute and sustain the suit on behalf of the deceased in the lower court, who was liable for the accident and whether the appellant was entitled to be awarded quantum by the trial court.

9. I will first deal with the issue whether the appellant had the requisite legal capacity to institute and sustain the suit on behalf of the deceased in the lower court. This is the main reason why the suit was struck out by the learned trial magistrate in his judgment. The learned trial magistrate was of the opinion that the limited grant *ad colligenda bona* that was produced in the trial court as P. exhibit 1 did not empower the appellant to sue. The appellant submitted that a claim under the Fatal Accidents Act did not require obtaining letters of administration *ad litem* before empowering a party to sue and that a party making the claim under that regime could directly commence a civil suit on behalf of the deceased.

10. In *Julian Adoyo Ongunga & another vs. Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR, the court held that that a party who had moved the court in a fatal claims suit on behalf of the estate without first obtaining a grant *ad litem* or a full grant lacked *locus standi* to bring the suit notwithstanding that he had a grant limited *ad colligenda bona*. The court stated that a limited grant *ad colligenda bona* did not extend to allow filing of suits in behalf of the estate. As similar potion was that by the Court of Appeal in *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR, that a limited grant *ad colligenda* that had been issued to the 1st respondent in that case was 'for purposes of instituting proceedings' and therefore insufficient to bestow legal capacity and *locus standi* to the said party to institute and maintain proceedings. See also *Lydia Ntembi Kairanya & Another vs. Attorney General* [2009] eKLR and *Stanley Muiru Njuguna & another vs. SK* [2019] eKLR.

11. A look at the limited grant *ad colligenda bona* that was produced before the trial court by the appellant states in part:

> "… but limited to the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted … "

12. Clearly, the said grant, in addition to being inappropriate, had also not been tailored to include institution and maintenance of a suit, at least going by its contents and wording. Similarly, the record of proceedings of the trial court does not indicate that there was ever a rectification of the grant or the making of any other order giving locus to the appellant. The appellant filed the instant suit on behalf of the estate of the deceased and not in her personal capacity as the widow of the deceased. Had she filed the suit as the widow in her personal capacity rather than on behalf of the estate of the deceased, then she and the deceased's dependants would have been entitled to damages under the Fatal Accidents Act. I am in agreement with the learned trial magistrate that the appellant did not have the requisite legal capacity and *locus standi* to file and maintain the suit on behalf of the estate of the deceased. in the circumstances, the appellant's appeal has to fail.

13. Had it been that the appellant had the requisite legal capacity to file and maintain suit, this court would have dealt with the issue of liability and quantum as hereunder.

14. Firstly, I would deal with who was liable for the accident. The appellant testified as PW1 stating that on 8th September 2000 she was with the deceased in the accident *matatu* vehicle, which was being driven along Haile Selassie Avenue, when the other vehicle came from the left side and collided with the *matatu* at the roundabout. PW1 added that the deceased died within a few minutes. she stated that she reported the accident at Milimani Police station where she was issued with a police abstract. In the police abstract, the driver of the *matat*u was listed as Stephen Karanja and the results of the investigations state that the driver of the lorry was to blame for the accident. It lists the 2nd respondent

as the driver of the lorry. PW1 produced a handwritten judgment as Exhibit 7 and of case number NRB CMCC 1733 of 2003. On cross-examination, PW1 stated that as per the said judgment, the 1st Respondent had sold the *matat*u to the said Stephen Karanja and that PW1 knew that Stephen Karanja was the owner of the lorry but had not sued him. PW1 stated that the copy of records indicated that the 1st respondent was the owner of the *matatu* as at 2002 but did not show who the owner was as at the date of the accident. PW1 further stated that the 1st respondent's name did not appear on the police abstract. she testified that she had written a demand letter to the 1st respondent, who in turn replied denying liability but PW1 did not have the said letter or reply in the trial court.PW1 further stated on cross-examination that the *matatu* was stationery on the command of traffic lights at the Haile Selassie Avenue roundabout when the lorry hit them, an accident PW1 said involved seven other vehicles. She added that she sued the driver of the lorry as she did not know the owner.

15. Stephen Karanja Njuguna, testified as DW1 stating and confirming that he was the driver of the *matatu* on the material day of the 8th September 2000 when the accident occurred. He confirmed PW1's testimony that the *matatu* had stopped at the Haile Selassie Avenue roundabout at the command of the traffic lights. DW1 stated that he was on the second lane of the road when the lorry rammed the *matatu* from behind causing the *matatu* to collide with the vehicle in front of it. DW1 added that the commotion pushed some vehicles onto other lanes on the roundabout while the *matatu* ended up on the right of the pavement. DW1 stated that the lorry had hit two other vehicles and landed on top of another car. DW1 stated that passengers in the *matatu* were injured and that one had died on the spot and another later succumbed to his injuries. He stated that the police arrived at the scene, took measurements and took the *matatu* to a police station near Kenyatta Hospital. DW1 contended that he was not charged with any offence concerning the accident. he added that the 1st respondent sold the motor vehicle to him in the year 2000.

16. On cross-examination, he conceded that he had not produced a copy of the sale agreement between him and the 1st respondent, and that according the copy of records, Exhibit 5(b), the 1st respondent ways shown as the owner of the vehicle. DW1 stated that the lorry was behind him and heading in the same direction as the *matatu*. On re-examination, he added that the lorry hit the back left side of the *matatu*. he testified that after he bought the vehicle from the 1st respondent, he was yet to conclude the process of transfer of the *matatu* to his name.

17. From the evidence on record, it is clear that the 1st respondent had little to do with the accident that occurred on 8th September 2000 and, if he did, then he was not liable for the accident. The police abstract absolved him of any blame which was placed squarely on the 2nd respondent. The evidence of both the appellant and DW1 indicated that they were hit by the lorry as they made a stop on the command of traffic lights. The *matatu* was observing traffic rules by stopping at the instant traffic lights when they were suddenly hit by the lorry and thus it cannot be said that the *matatu* was at fault for being stationery because the 1st respondent was lawfully obeying traffic lights. In the foregoing, I would have found the 2nd respondent 100% liable for the accident that occurred on 8th September 2000 and absolve the 1st respondent from any liability whatsoever.

18. I now turn to the issue as to whether the appellant was entitled to be awarded damages by the trial court. I would apply the facts of the case to the principles stated in the following cases. In *Julian Adoyo Ongunga & another vs. Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR (supra), it was held that:

> *"Concerning damages arising out of fatal claims under the Law Reform Act and the Fatal Accidents Act, it is settled that a Court can award damages to the deceased's estate under the Law Reform Act on account of the pain and suffering before death as well as on the loss of expectation of life or otherwise referred to as "the lost years." Likewise, a Court can award damages under the Fatal Accidents Act to the dependants for the loss of dependency. However, when dealing with a claim under both said Acts, a Court is to be carefully to discount the amount awarded on the loss of expectation of life/lost years from the final award. This was clearly laid down by the Court of Appeal in the case of Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs. AM Lubia & Olive Lubia (1982-88), KAR 727."*

19. In *Hyder Nthenya Musili & another vs. China Wu Yi Limited & another* [2017] eKLR, it was held that:

> *"What are the applicable principles of law as regards the award of the damages urged by the parties? To properly assess damages under the Fatal Accidents Act, it is necessary to determine the deceased's income, the dependency ratio of his dependants and the multiplier to be used. This Court is guided by the manner of assessment of damages for loss of dependency as aptly explained by Ringera J. (as he then was) in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988 as follows:*
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> > *"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."*

20. In *Chunibhai J Patel and Another vs PF Hayes and Others* [1957] EA 748, 749 the Court of Appeal stated, on the manner of assessment of damages under the Fatal Accident's Act, that:

> *"The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the*

expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."

21. From the record, the letter from the employer of the deceased was produced in the trial by consent and adopted. The said letter indicated that the deceased was earning a gross salary of Kshs. 20,000.00. In calculating his net salary, the statutory deductions of PAYE, NHIF and NSSF would be taken into account as follows:

a) PAYE (30% of the gross salary) – Kshs. 6,000.00

b) NHIF – Kshs. 320.00

c) NSSF – Kshs. 200.00

Total statutory deductions – Kshs. 6,520.00

22. The deceased's net salary after the deductions would thus be Kshs. 13,480.00 which would have been the applicable multiplicand. He was 31 years at the time of his death, and going by the statutory retirement age, he could have retired at the age of 60 years meaning he could have worked for 29 years. Bearing in mind the vicissitudes of life or other imponderables which would have shortened the deceased's working life, it is my opinion that a multiplier of 20 years would have been appropriate. The deceased had 3 dependants, two of whom were minors at the time thus a ratio of 2/3 would have been appropriate. In the foregoing, I would have awarded the Appellant Kshs. 2,156,800.00 for loss of dependency under the Fatal Accidents Act, based on the following calculation:

13,480 x 12 x 20 x 2/3 = Kshs. 2,156,800.00

I would not have considered any compensation for pain and suffering under the Law Reform Act because from the evidence on record, the deceased died on the spot.

23. On special damages, the appellant would have been able to prove expenses worth Kshs. 38,900,00 based on a summary of the receipts on record.

24. In conclusion, I am in agreement with the learned magistrate that the appellant lacked the requisite legal capacity and *locus standi* to institute and maintain suit on behalf of the estate of the deceased. She would have been able to institute the suit had she sued in her personal capacity as a widow to the deceased and on behalf of her children under the Fatal Accidents Act. *Locus standi* goes to the root of any case, in a much similar manner as of jurisdiction of courts. Aa party cannot move the court any further, should it be established that the party lacked the requisite locus.

25. In the foregoing, I find that this appeal lacks merit and I hereby dismiss it in its entirety.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W MUSYOKA

JUDGE