



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.33 OF 2015

BETWEEN

MWAMATI NZULI.....1ST APPELLANT

EASY COACH LTD.....2ND APPELLANT

AND

JOSEPH OLUCH ONYANGO (Suing as the personal representative and
the administrator of the estate of

RICHARD OSIANGA MARUNGA)RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No. 182 of 2010 by Hon. C.I Agutu – Resident Magistrate).

JUDGMENT

1. The appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 182 of 2010. They had been sued by the respondent for special and general damages following a road traffic accident which involved motor vehicle KBF 646H where the deceased was fatally injured. The 1st appellant was the driver of the said motor vehicle while 2nd defendant was the registered owner of motor vehicle KBF 646H. The 1st appellant was blamed for the accident and the second appellant was held vicariously liable for the accident.

2. In her judgment, the learned trial magistrate made an award as follows:

- a) Pain and suffering Kshs. 25,000/=
- b) Loss of life expectation Kshs. 60,000/=
- c) Under the Fatal Accidents Act he was awarded Kshs 1,080,000/=

The total award was therefore Kshs.1, 152,500.

3. The appellants were aggrieved by the judgment which was delivered on 22nd September 2015 and filed this appeal. The appellants were represented by the firm of Akwala & Company advocates. They raised the following grounds of appeal:

- a) The learned trial magistrate erred in law and in fact in awarding the respondent damages under the Law Reform Act, CAP.26 laws of Kenya, yet at the time of filing of the suit the respondent had not yet obtained a grant of letters of administration.
- b) The learned trial magistrate erred in law and in fact in awarding damages under the law Reform Act when the same was not pleaded.
- c) The learned trial magistrate erred in law and in fact in awarding damages on the head of pain and suffering and loss of expectation of life that were inordinately high in the circumstances of the case.
- d) The learned trial magistrate erred in law and in fact in awarding damages for loss of dependency without prove of dependency.

- e) The learned trial magistrate erred in law and in fact in adopting a monthly income of Kshs.9, 000/= without any basis.
- f) The learned trial magistrate erred in law and in fact in applying a multiplier of 30 years and a dependency ratio of two-thirds.
- g) The learned trial magistrate erred in law and in fact by failing to consider the issues raised by the appellants.
- h) The learned trial magistrate failed to analyze the facts and evidence on record in determining the quantum of damages.

4. The respondent was represented by the firm of Amos O. Oyuko & Company Advocates. He opposed the appeal on grounds that the decision of the trial court was legally sound.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. There are only two issues that arise from the appeal. These are:

- a) Whether the respondent had capacity to institute and maintain the suit; and
- b) Whether the awards were inordinately high.

7. It has evidently come out that when the respondent filed the suit in the Busia Chief Magistrate's Court Civil Case Number 182 of 2010 he had not obtained a grant of letters of administration in respect of Richard Osianga Marunga, the deceased who was the subject of the suit. He subsequently obtained it on 13th January 2014. Section 2 (3) of the Law Reform Act provides as follows:

No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.

Whereas section 4 (1) of the Fatal Accidents Act provides:

Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of th person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

8. The respondent was therefore required to first obtain an appropriate grant before filing of the suit so as to have the necessary *locus standi*. In the case of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88)1 KAR** the Court of Appeal held:

The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception.

In the instant case the respondent did not have *locus standi* at the time of filing of the suit. Upon obtaining the grant on 13th January 2014 he ought to have moved the court, if the same was not opposed, to regularize the position. Alternatively he ought to have withdrawn the earlier suit and file a fresh one. The effect of lack of the requisite *locus standi* was to have the suit struck out.

9. It is trite that one cannot benefit from both the Law Reform Act and the Fatal Accidents Act. In **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** the Court said as follows:

The net benefit will be inherited by the same dependents under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

In the instant case, the learned trial magistrate did not discount the awards under the Law reform Act. Otherwise I find the awards reasonable.

10. If the respondent had *locus standi*, the only issue I would have addressed is the discounting of the awards under the Law Reform Act from the total award. Since he lacked the requisite *locus standi*, the appeal is allowed. I make the following orders:

a) The judgment and decree of the trial court in the Busia Chief Magistrate's Court Civil Case Number 182 of 2010 be and is hereby set aside and is substituted with an order striking out the said the Busia Chief Magistrate's Court Civil Case Number 182 of 2010.

b) Since the issue of *locus standi* was not raised before the trial court, each party to the appeal shall bear own costs both in the appeal and in the trial court.

DELIVERED and SIGNED at BUSIA this 12th day of June, 2019

KIARIE WAWERU KIARIE

JUDGE