**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 139 OF 2018**

**BETWEEN**

**DAVID BETT.....1ST APPELLANT**

**DAVID BETT CHRISTOPHER KIRWA BUSIENEI.....2ND APPELLANT**

**AND**

**JOSEPH NJUGUNA NGÁNGÁ & MARY WAIRIMU NJUGUNA (suing as a legal administrators of the estate of JANE MUTHONI NJUGUNA).....RESPONDENTS**

***(Being an Appeal from the Judgment and Decree in Thika CMCC No. 29 of 2016 by Hon. B.J.Bartoo(RM) on 27th September, 2018)***

***JUDGMENT***

1. **JOSEPH NJUGUNA NGÁNGÁ & MARY WAIRIMU NJUGUNA *(hereinafter referred to as Respondents)*** sued **DAVID BETT and CHRISTOPHER KIRWA BUSIENEI *(hereinafter referred to as Appellants)*** in the lower court claiming damages for fatal injuries suffered by their daughter **JANE MUTHONI NJUGUNA (*hereinafter referred to as the Deceased*)** on 03rd September, 2012 when she was knocked down by the motor vehicle 1st Appellant's motor vehicle KAD 428J which was allegedly driven negligently by the 2nd Appellant as a result of which the deceased suffered fatal injuries.

2. The Appellants filed a joint statement of Defence and denied the claim.

3. In a judgment delivered on **27th September, 2018,** the trial court apportioned liability at 100% as against both Appellants and awarded damages in the sum of Kshs. 1,197,085/-.

**The Appeal**

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 26.10.18 filed the Memorandum of Appeal dated 25.10.18 which sets out 11 grounds of appeal that may be summarized into the following 6 grounds that: -

**1) The Learned Magistrate erred in in holding that the 1st Respondent had properly obtained leave to file suit out of time**

**2) The Learned Magistrate erred in law in failing to hold that the 1st Respondent's application for leave to file suit out of time was incompetent having been filed by persons who had not obtained a grant of representation to the deceased's estate**

**3) The Learned Magistrate erred in law in failing to hold that the suit before the court was statutorily time barred by dint of Section 4(2) of the Limitation of Actions Act**

**4) The Learned Magistrate erred in holding the Appellants liable for the accident**

**5) The Learned Magistrate erred in law in computation of general damages for loss of dependency and for awarding damages under the Fatal Accidents Act twice**

**6) The Learned Magistrate erred in awarding damages both under the Law Reform Act and Fatal Accidents Act**

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

**Analysis and Determination**

6. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See ***David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR***). It then behooves this court to summarize the evidence that was tendered before the trial court.

7. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the following issues:

**a) Validity of the originating summons in respect of which leave to file suit out of time was obtained**

**b) The merit of leave to file suit out of time**

**c) Locus of the 1st Respondent to seek leave to file suit out of time**

**d) Liability of the Appellants**

**e) Computation of the award for loss of dependency**

**f) The merit of the award of Kshs. 150,000/- under the Law Reform Act**

8. I will endevour to analyze each of the issues as hereunder.

**a) Validity of the originating summons in respect of which leave to file suit out of time was obtained**

9. The Appellants argued that the originating summons in respect of which leave to file suit out of time was obtained was defective for the reason that it was signed by MUSILI MBITI & ASSOCIATES advocate for the Applicant and was supported by an affidavit sworn by one PAUL ONYANGO OCHOLA and not by any of the Respondents.

10. The Respondents contend that the originating summons seeking leave to file suit out of time was rightfully signed by the advocate and concede that there was a typographical error in the affidavit supporting the summons which is purported to have been sworn by one PAUL ONYANGO OCHOLA and not by the 1st Respondent and urged court not to punish them for errors and blunders of counsel.

11. I entirely agree with the Appellants that the originating summons seeking leave to file suit out of time was rightfully signed by their advocate. On the issue of the supporting affidavit, I find that it would not be in the interest of justice to penalize the Appellants for the typographical error made by their counsel. In arriving at this decision, I find succor from the decision in **Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103** where Apolo, Judge (as he then was) rendered himself thus,

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits".**

**b) The merit of leave to file suit out of time**

12. The accident the subject of this case occurred on 03rd September, 2012. The last day of filing a claim was 03rd September, 2015. The originating summons for leave to file suit out of time was filed on 25th September, 2015 which was 22 days outside the limitation period. Leave was granted on 12th November, 2015 and the suit was filed on 21st January, 2016 which was about 2 months from the date leave was granted.

13. Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya (***the Act*****)** provides that:

> **"An action founded on tort may not be brought after the end of three years from the date on which the cause of action".**

14. The Appellants hold the view that the order granting the Respondents leave under Section 27 of the Limitation of Actions Act (***the Act***) to file suit out of time was not merited for the reason that the explanations advanced for filing suit out of time are not facts that relate to the cause of action. In support thereof, reliance was placed on **Gathoni v Kenya Co-operative Creameries Ltd[1982]** and **Hellen Kiramana v PCEA Kikuyu Hospital [2015] eKLR** where the courts held that an application for leave to file suit out of time can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof,

15. Appellants also relied on **Lucia Wambui Ngugi – Vs – Kenya Railways and Another – NRB HCMA No. 213/89 where Mbito J** (as he then was), observed that: -

> **"When an application is made for leave under the Limitation of Actions Act, a Judge in chambers should not grant leave as**

**of course. He should carefully scrutinize the case to see whether it is a proper one for leave."**

16. It was additionally submitted on behalf of the Appellants that failure by advocate to file suit in time was not a material fact relating to the cause of action herein and in support thereof reliance was placed on **Askah Mogendi & Another V Shem Magara [2012] eKLR, Jonathan Malinda v Lota Motors Ltd & another & Anti-pest (K) Limited [2013] eKLR** and **Re The Estate of Nemwel Nyasagare Nyanaro (Deceased) [2013] eKLR.**

17. The Respondents urged the court to salvage their case in the interest of justice for the reason that it had not demonstrated that the delay had caused the Appellants any prejudice. They placed reliance on **Anchor Limited v Sports Kenya [2017] eKLR** where Ngugi J declined to strike out a counterclaim that was not supported by a verifying affidavit.

18. I have considered the originating summons seeking leave and the supporting affidavit thereof and I am persuaded that the magistrate that granted leave did not do so as a matter of course but must have scrutinized the application and finding that the application was filed only 22 days outside the limitation period found that this was a proper case for leave.

19. The general trend, following the enactment of **Sections 1A**, **1B, 3** and **3B** of the **Civil Procedure Act** and **Article 159(2) (d)** of the **Constitution**, is that courts today place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

20. As stated hereinabove, the application for leave to file suit out of time was filed 22 days outside the limitation period and the suit was filed about 2 months from the date leave was granted. The delay in filing the suit is in my considered view not inordinate and has been explained. That procedural lapse on the part of the Respondents is excusable under the provisions of aforementioned provisions of the Constitution and the Civil Procedure Act. It should be the court's last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all vested on this court by Article 159 of the Constitution cannot be said and be seen to be exercised if the court were to deny a party a chance to be heard on merit especially where failure to file suit within time has been explained and the party has moved the court without delay.

21. From the foregoing analysis, I find that leave to file suit out of time was merited.

**c) Locus of the 1st Respondent to seek leave to file suit out of time**

22. Appellants submitted that the Respondents had not obtained letters of representation to the deceased's estate as at the time leave to file suit out of time was granted and that the Respondents did therefore have locus to seek leave.

23. The Appellants concede that the letters of presentation were indeed obtained after leave to file suit out of time was granted and urge the court to find that failure to comply with procedure does not invalidate the said letters. In support thereof, reliance was placed on **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311,** in which the Court cited with approval ***The Judicial Review Handbook*** **(3rd Edn) by Michael Fordham at 361**, **Republic vs. Kensington and Chelsea Royal LBC [1989] All ER 1202 at 1215,** ***Role of a Judge*** **by J Cardozo 52 Harvard LR 361 at 363; Seaford Court Estates Ltd vs. Asher [1994] 2 All ER 155 at 164** and held that:

> **"… It is well settled that 'rule of procedure cannot be allowed to become mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice…A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it. A Judge must not alter the material of which the Act is known but he can and should iron out the creases…."**

24. The issue in question is whether the procedural lapse could be ameliorated by reliance on Article 159 (2) (d) of the Kenya Constitution, 2010. The procedural lapse notwithstanding, the Appellants fully exercised their right to be heard in the matter in issue. There is no evidence that they suffered any prejudice caused by the alleged procedural lapse as their substantive rights were not violated. Nor were they subjected to an unfair trial as they made representations at the hearing. Consequently, I find that. Article 159 (2) (d) inhaled life into the suit and gave it a merit disposal.

**d) Liability of the Appellants**

25. Concerning the issue of liability, the Appellants submitted that although an accident occurred involving 1st Appellant's vehicle which was being driven by the 2nd Respondent as a result of which the deceased died, there was no evidence that the 2nd Respondent was negligent since the evidence by PW2 who was an alleged eye witness was contradictory concerning the time of the accident.

26. On the other hand, the Respondents submitted that the evidence by PW2 that the 2nd Appellant did not keep a proper lookout for the deceased who was crossing the road on a zebra crossing was not controverted and that the trial court rightfully found the Appellants liable.

27. The court record reveals that the 2nd Appellant who was the driver of the accident motor vehicle did not testify. It therefore, that PW2's evidence that the 2nd Appellant failed to keep a proper lookout for the deceased who was crossing the road on a zebra crossing was not controverted. In arriving at this decision, I am fortified by the holding in the case of **Janet Kaphiphe Ouma & Another Vs Marie Stopes**

**International Kisumu HCCC No. 68 of 2007,** cited by the Respondents, the court held that:

> **"In this matter, apart from filing its statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…sections 107 and 108 of the Evidence act are clear that he who asserts or pleads must assert the same by way of evidence."**

28. Similarly in **Autar Singh Bahra and Another Vs Raju Govindji HCCC NO. 548 of 1998 (UR)** also cited by the Respondents**, Mbaluto J. (**as he then was**) held**

> **"Although the Defendant has denied liability in amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."**

29. In light of the above cases, it is plain that the Appellants proved their case on a balance of probability and the trial court rightfully found defendants liable at 100%.

**e) Computation of the award for loss of dependency**

30. Both parties are in agreement that that there exists an error regarding the computation of loss of dependency and that the sum ought to have been Kshs. 551,680/- and not Kshs. 827,520/- that was awarded under this heading.

31. This is an issue that could have been properly resolved by way of review by the trial court under the provisions of Order 45 rule 2 of the Civil Procedure Rules. This court takes judicial notice of the arithmetic error and hereby reviews the sum of Kshs. 827,520/- awarded for loss of dependency and substitutes it with an award for the sum of Kshs. 551,680/-.

**f) Award of Kshs. 150,000/- under the Law Reform Act**

32. The Appellants submitted that the award of Kshs. 150,000/- for loss of expectation of life amounts to double compensation. The Appellants did not make any submission on this issue.

33. The concept of double compensation was explained in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) Vs Kiarie Shoe Stores Limited, Nyeri Civil Appeal No. 22 of 2014** where the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that: -

> **".. this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise''.**

34. The Court of Appeal re- stated what was held in **Kemfro Africa Limited t/a Meru Express Services 1976 & Another Vs Lubia & Another (1987) eKLR 30** that:

> 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 of the rights conferred on the dependents 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 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'. 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 non – pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.**

35. In the case of **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**, Mativo J, had this to say about Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act

> **"I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act."**

36. The judge cited in **Richard Omeyo Omino vs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007** with approval, where **Karanja J** in discussing the provisions of Section 2 (5) of the Law Reform Act stated: -

> **"The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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.**
>
> **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."**

37. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

**DISPOSITION**

38. In view of the finding I have made, the appeal partially succeeds. I substitute the judgment of the trial court on the sum of Kshs. 827,520/- awarded for loss of dependency with an award for the sum of Kshs. 551,680/-. All other awards remain as awarded.

39. Since the Appellants have partially succeeded each party shall bear its own costs of this appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS.***12th* **DAY OF** *September* **2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistants - Nancy & Morris

For the Appellants -N/A

For the Respondents - NA