



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 166 OF 2015**

**WAITA MBOO MWALILI** *suing as the personal Representative of*  
*the estate of MUSILA WAIT(Deceased)*.....**APPELLANT**

**VERSUS**

**MOSES MUTEMI**.....**RESPONDENT**

*(Being an appeal from the judgement by Honourable Gilbert Shikwe Senior Resident Magistrate Kithimani in SRMCC No. 139 of 2013 delivered on the 7<sup>th</sup> day of October 2015)*

**JUDGEMENT**

1. The appellant is aggrieved by the judgment delivered on 7.10.2015 by Hon Gilbert Shikwe in Kithimani SRMCC No.139 of 2013 where the Appellant was held to have contributed to the accident at 50% and awarded general damages of Kshs 300,000/ as well as special damages of Kshs 18,900/.
2. Musila Waita (hereafter referred to as *the deceased*) died in a road traffic accident on 26.12.2011. He was run over by a Motor vehicle registration number KBA 681Z that was owned and driven by the respondent.
3. The Appellant, Waita Mboo is the grandfather to the deceased and he brought a claim for damages against the appellant under the Fatal Accidents Act only.
4. At paragraph 4 of the plaint, he pleaded as follows: That on the 26<sup>th</sup> December, 2011 the deceased was a lawful pedal cyclist off the road along Matuu-Thika road at Dreamland area when the said motor vehicle was so negligently managed driven and/or controlled that it veered off the road and knocked down the deceased as a result of which accident the deceased sustained fatal injuries hence his estate has suffered loss. The particulars of negligence were *inter alia* as follows: driving without due care and attention; causing the accident; and, failing to stop or avoid the accident.
5. By a statement of defence dated 17<sup>th</sup> April, 2014, the respondent denied the claim *in toto*. He averred that the deceased caused the accident by pedaling and encroaching on the lane of the suit vehicle and averred that the appellant was disentitled to damages. He further averred that the accident was caused by circumstances beyond his control and challenged the capacity of the appellant to institute the instant suit.
6. The learned trial magistrate found that the deceased and the respondent jointly contributed to the accident, and apportioned liability at 50% to the appellant and 50% to the respondent. He found that the appellant did not produce letters of administration ad litem and thus the claim for pain and suffering could not be maintained and what was left was loss of dependency. He awarded the estate Kshs 300,000/- for loss of dependency and Kshs 18,900/- for special damages. The appellant was also granted costs of the suit and interest.
7. The appellant has challenged those findings through a memorandum of appeal dated 2<sup>nd</sup> November, 2015. There are 6 grounds of appeal. They can be condensed into *three*. First, that the learned trial magistrate erred by holding the appellant and the respondent equally liable in the absence of direct evidence; secondly, that the respondent failed to prove his allegations of negligence on a balance of probabilities; thirdly, that the trial court applied wrong principles in assessment of damages and failed to consider the applicable principles of law in the fatal claims leading to miscarriage of justice to the appellant.
8. The appeal is contested by the respondent. The respondent relied on written submissions dated 10<sup>th</sup> April, 2019. The respondent contends that the lower court applied the correct formula to assess damages; and, that there are no grounds for interference with the discretion of the learned trial magistrate. The respondent implored this court to dismiss the appeal.

9. The appellant also filed submissions on 7<sup>th</sup> March, 2019 and averred that the trial magistrate did not give any reasons for his findings and that loss of earnings need not be proven by documentary evidence as per the case of **Leonard O. Ekisa & Another v Major K. Kigen (2005) eKLR**.

10. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions. This is a first appeal to the High Court. It is thus an appeal on both fact and the law. I am required to re-evaluate all the evidence on record and to draw my independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

11. PW1 was CIP Dorcas Nyaga. She relied on the records on the file and the OB to testify that the deceased was injured in the road accident. The deceased was carrying three sacks of French beans when he was knocked by the respondent who landed on a ditch on the right side. The sketch plan showed that both parties were heading to Thika. On cross-examination, she said that from the sketch plan the possible point of impact was the point where the debris were discovered but there were no skid marks and that the matter was still pending under investigation.

12. PW2 was Alex Mutiso Nguli, a businessman who was informed of the accident by a fellow businesswoman who received a call from an unknown person over the same. By the time he got to the scene, the deceased had died. He testified upon cross examination, that-

*"I did not witness the accident or see it as it occurred.."*

13. PW3 was Waita Mboo. He did not witness the accident. He was dependent on the deceased and was receiving Kshs 500 per month from the deceased who was earning over Kshs 20,000 per month as a businessman and farmer. He said he spent money for the transport and mortuary expenses. He presented payment receipts.

14. That marked the close of the appellant's case in the lower court. The advocate for the respondent pointed out to court that the letters of administration had not been produced. The respondent testified that the deceased had three sacks on his motorcycle and was riding on the middle of the road hence unable to control the motorcycle. On cross-examination, he testified that he was trying to overtake the deceased and hit him, however they both swerved to the right and he landed in a ditch. He further stated that he took the deceased to hospital because he was still alive. There was no other witness and the respondent closed his case.

15. From that evidence it is not in dispute that the accident occurred on 26.12.2011; and, that the deceased died and it appears to the court that there is an issue which is to the effect that the appellant lacked the *locus standi* to commence, originate or maintain the suit and as such the proceedings and the judgment of the trial court remain a nullity. This is a cardinal ground which ought to be dealt with since its outcome will determine the way forward in respect to the rest of the grounds.

16. The learned counsel for the respondent pointed out the same to the court and the trial magistrate was cognizant of this fact, however did not address the issue of locus standi.

17. Under **Section 2** of the Law Reform Act and **Section 4** of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. This means that such a person ought to first obtain an appropriate grant so as to have the necessary *locus standi*, a full or limited grant may suffice (See the Court of Appeal case of **Virginia Edith Wamboi v Joash Ochieng Ougo & Another (1982-88)**)

18. The appellant indicated that he had the same as per his list of documents but however there is none on record. In fact a perusal of the list of documents dated 25<sup>th</sup> May 2013 reveals that no Ad Litem was listed as part of the documents. **Section 54** of the Law of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as '**the Act**') states that:

**'54. A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'**

19. There are many types of limited and special grants provided for by the law. However I shall confine myself to the pleadings that mention Limited Grant of Letters of Administration *Ad Litem*. The same is provided for under **Form 14** of the **Fifth Schedule** of the Act and deals with suits. The said provision states as follows:-

**'when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution'.**

20. Learned counsel for the appellant was aware that Limited Grant of Letters of Administration *Ad Litem* were to be used and were required when the estate of a the deceased was to be represented in court proceedings. (**Greenway vs. Mc Kay (1911) 12 CLR 310**).

21. The issue of *locus standi* was neither raised nor addressed before the trial court. However the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the matter and a party without *locus standi* in a civil suit lacks the capacity and right to institute and/or maintain that suit even where a valid cause of action subsists and lack of the same amounts to null and void proceedings.

22. Section 82 of the Law of Succession Act is to the effect that

**Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;**

23. In this matter, in light of my foregoing analysis, there is no evidence of appointment of a personal representative to the estate of the deceased. Therefore from the record, the appellant lacked the requisite *locus standi* to institute and/or maintain the suit in the trial court. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so and they are indeed a nullity. Be that as it may, it is this Court's belief that all is not lost as the matter can be legally revisited.

24. However, had the appellant been clothed with legal standing, the court would have found as follows. On **liability**, the evidence of how the accident occurred is quite clear. There is an eye-witness who testified as DW1 whose evidence placed the driver of the accident vehicle as well as the motorcycle rider at fault and thereby proved the particulars of negligence as appearing in the Plaintiff and the defence. None of this evidence was shaken even in cross-examination. The trial court was only left with the evidence of the police officer, who testified that the matter was pending investigation. Hence the trial court did its best and on a balance of probability found for the Appellant and apportioned liability at 50/50 against the Respondent. In this regard the learned trial magistrate cannot therefore be said to have erred on the issue of liability.

25. On the issue of **quantum**, this Court is guided by the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777**. The court expressed itself clearly thus:-

***"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

26. With regard to damages arising out of fatal claims under the Law Reform Act and the Fatal Accidents Act, 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*." Further 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 has to discount the amount awarded on the loss of expectation of life/lost years from the final award. See **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini =vs= A. M. Lubia & Olive Lubia (1982-88), KAR 727**.

27. Having perused the judgment of the trial court, I noted that it declined to award damages for loss of expectation of life under the Law Reform Act, and awarded a global sum of Kshs 300,000/- for loss of dependency. I find no error in using the approach of awarding a global sum. However I find the amount to be rather low, because courts have found that a child in an African setting is considered an asset. See the Court of Appeal case of **Hassan -vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457** which held thus:

***"The fact of the matter is, however, that today parents and children in most Kenya families do expect their children when adults to help their parents if they need it and, in any view, that should be encouraged and not fulminated against as a system of gerontocracy at its worst."***

28. In **Ann Kanja Kithinji (suing as the legal representative of the Estate of Patrick Koome (Deceased) & 2 others v Jacob Kirari & another [2018] eKLR** a 32 year old farmer's family was awarded Kshs 800,000/- as a global sum for loss of dependency as she left behind a husband and children; in the case of **Chen Wembo & 2 others Vs IKK & Another (suing as the legal representative of the estate of CRK (deceased) (2017) eKLR**, Meoli J made a lumpsum award of Kshs.600,000/= to the estate of a deceased who had died at the age of 12 and a school report was produced that indicated that the deceased was an average student. In the instant case I would have awarded the estate of the deceased a global sum of Kshs. 700,000/= for there is evidence that he was selling farm produce as a means of earning a living.

29. From the above analysis and having found that the Appellant lacked the *locus standi* in the suit, I make the following orders:-

**a) The appeal be and is hereby dismissed;**

**b) The judgment and decree of the trial court in Kithimani Principal Magistrate's Court Civil Case No. 139 of 2013 be and is hereby set aside and is substituted with an order striking out the said Kithimani Principal Magistrate's Court Civil Case No. 139 of 2013.**

**c) Since the issue of *locus standi* was not raised before the trial court, each party to the appeal shall bear their own costs both in the appeal as well as in the suit.**

It is so ordered.

Dated and delivered at Machakos this 18<sup>th</sup> day of September, 2019.

D.K. KEMEI

JUDGE