



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.59 OF 2017**

**BETWEEN**

**1. JACKLINE AKINYI ODHIAMBO**

**2. MAURINE ADHIAMBO ODHIAMBO** (suing as Administrators and personal

representatives of the estate of **DICKSON ODHIAMBO OBIERO**).....**APPELLANTS**

**VERSUS**

**SUKARI INDUSTRIES LIMITED**.....**RESPONDENT**

*(An appeal from the Judgment and decree of the senior Chief Magistrate's Court, Homa Bay in CMCC No.180 of 2012 delivered on the 26<sup>th</sup>/07/2017 – HON. P. MAYOVA, SRM)*

**JUDGMENT**

[1] This appeal by the appellants **JACKLINE AKINYI ODHIAMBO** and **MAURINE ADHIAMBO**, suing as administrators and personal representative of the estate of **DICKSON ODHIAMBO OBIERO** (deceased), arises from the decision of the Principle Magistrate delivered on the 26<sup>th</sup> July 2017, in Homa Bay Civil Suit No.180 of 2012, in which the appellants claimed against the respondent, **SUKARI INDUSTRIES LIMITED**, general and special damages arising from an accident which occurred on 16<sup>th</sup> June 2012, while the deceased was in the course of his employment with the respondent company.

[2] It was pleaded that on the material date, the deceased was lawfully and carefully operating a motor vehicle/machine Registration No.BCH 14050 Bell when it developed mechanical problems and caused an accident from which the deceased suffered fatal injuries and passed away leaving behind two widows and eight children.

[3] The appellants attributed the accident to the respondent's negligence and/or breach of statutory duty and prayed for damages against it with costs and interest.

The respondent filed a statement of defence in which it denied the allegations made against itself by the appellants and contended that if the accident indeed occurred, then it was wholly occasioned and/or substantially caused by negligence on the part of the deceased.

The respondent therefore prayed for the dismissal of the appellants' suit with costs.

[4] At the hearing of the case, evidence was led by the appellants but not the respondent. As it were, the respondent closed its case without leading evidence in support and proof of its statement of defence. The appellants' evidence was thus not controverted in any manner.

At the end of the hearing, the trial court found in favour of the appellants against the respondent on the question of liability. The respondent was found 100% liable to the appellant for the consequences of its negligent acts which led to the accident.

[5] On the question of quantum of damages and in particular for loss of dependency, the trial court opined that a sum of Kshs.2,400,000/= made up as follows:-  $Kshs.15000/= \times 20 \times 12 \times \frac{2}{3} = Kshs.2,400,000/=$  would suffice as adequate compensation under the head.

Otherwise, the appellants' suit was dismissed with costs for want of locus standi on the part of the appellants.

[6] Being dissatisfied with the decision of the trial court to dismiss the suit, the appellant preferred ten (10) grounds of appeal contained in the memorandum of appeal dated 7<sup>th</sup> August 2017.

The appeal was heard by way of written submissions which were filed by the firm of **ODERO OKOYO & COMPANY ADVOCATES**, on behalf of the appellants and the firm of **OMWENGA & COMPANY ADVOCATES**, on behalf of the respondent.

[7] This was a first appeal and the duty of this court in the circumstances was to re-consider the evidence adduced by the parties at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing the witnesses.

In that regard, the court revisited the appellants' evidence through the second appellant **MAURINE ADHIAMBO ODHIAMBO (PW1)** and **THOMAS MBOYA OBUDHA (PW2)**, and found that the same was sufficient and credible enough to hold the respondent fully liable for the consequences of its negligent acts which led to the demise of the deceased.

[8] Indeed, the respondent's denial of the occurrence of the accident and the employment of the deceased as its machine operator was disproved by the appellants' evidence which went on to establish on a balance of probabilities that the respondent failed to ensure the safety of the deceased while in the course of employment and actually disregarded it when it assigned him to work on a machine which was not properly maintained and was indeed defective.

The respondent alleged that the accident was wholly or substantially contributed to by the negligence of the deceased, but failed to lead any evidence in support thereof.

[9] On quantum of damages, the trial court accepted that there was no proof of the deceased's earnings but opined that he earned at least Kshs.15,000/= and that since he was aged 37 years at the time of his death, he would have worked for more than 20 years even though the current retirement age is sixty (60) years.

Based on that opinion, the appellants were awarded Kshs.2,400,000/= for loss of dependency.

[10] Given that the deceased's monthly earnings was said to be Kshs.20,000/= as per the evidence of the second appellant which was not disproved by the respondent, it would follow that the assessment of damages for loss of dependency by the trial court was proper. The multiplicand of Kshs.15000/= per month was fair and reasonable and would be upheld by this court.

[11] For all the reasons foregoing, grounds three (3), five (5), six (6), seven (7), eight (8), nine (9) and ten (10) of the appeal are unsustainable.

With regard to grounds one (1), two (2) and four (4), which are the crux of this appeal in as much as the appellants suit was ultimately dismissed by the trial court for want of "**locus standi**", the appellants contended that the trial court erred in law and fact by finding that they did not have "**locus standi**" to file the suit for reasons that they did not take out necessary letters of administration respecting the estate of the deceased.

[12] They (appellants) contended that their claim against the respondent was not grounded on the **Law Reform Act** but the **Fatal Accidents Act (Cap 32 Laws of Kenya)**. As such, it was not mandatory for them to take out letters of administration.

Indeed, a person without necessary "**locus standi**" has no right to appear or be heard by any court on any claim. So, if the appellants did not have the "**locus standi**" to institute this suit against the respondent, its dismissal by the trial court was proper notwithstanding the holding that the respondent was fully liable for the accident and that the appellants would have been entitled to damages for loss of dependency if the suit was proper before the court.

[13] In the plaint filed in the lower court on 22<sup>nd</sup> October 2012, it was clear that the appellants were suing the respondent in their capacity as personal representatives and administrators of the estate of the deceased but when it came to losses and damages they involved the Fatal Accident Act to only claim for loss of dependency. They clearly disregarded damages available to them under the **Law Reform Act (Cap 26 Laws of Kenya)**. They therefore deemed it unnecessary to take out grant of letters of administration regarding the estate of the deceased prior to filing this suit.

[14] The big question is whether that omission was fatal to this case:

Any action for the benefit of the family of the deceased was to be brought in the name of the executor or administrator of the estate of the deceased pursuant to **Section 4** of the **Fatal Accidents Act**. This implies that a member of the family of the deceased may obtain grant of letters of administration before filing any suit on behalf of the dependents of the deceased. It is then that he may assume the necessary "**locus standi**" to file suit on the basis of the grant.

[15] Herein, the appellants purported to file the suit as administrators and personal representatives of the estate of the deceased yet they were not in possession of a valid grant of letters of administration. However, they concentrated and upheld the claim in so far as it related to loss of dependency and not loss of expectation of life or pain and suffering under the Law Reform Act.

[16] A claim under the Law Reform Act is normally brought on behalf of the estate of the deceased by a party in his capacity as the administrator of the estate.

In the circumstances, the party must obtain the necessary grant of letters of administration to achieve the necessary "**locus standi**" to bring the claim.

A claim under the Fatal Accidents Act is predicated on the claimant and others being dependents of the deceased. That alone, would entitle them to claim for loss of dependency with or without grant of letters of administration. (See, **MARKO MWENDA –VS- BERNARD**

**MUGAMBI & ANOTHER NBI HCCC NO.2343 OF 1993).**

[17] In any event, there was no substantial dispute that the appellants and their children were dependents of the deceased and that they suffered loss as a result of his demise at his place of work due to the negligence of the respondent.

The answer of this court to the big question is that the failure by the appellants to obtain letters of administration respecting the estate of the deceased was not fatal to this case

[18] Such a failure may also be regarded as a procedural or technical error for which substantial justice cannot be sacrificed.

Undue regard to procedural technicalities is frowned at by dint of **Article 159 (2) (a)** of the **Constitution of Kenya, 2010**, which provides that justice shall be administered without undue regard to procedural technicalities.

Consequently, grounds one (1), two (2) and four (4) of the appeal are hereby upheld.

[19] In sum, this appeal is allowed to the extent that the trial court's order dismissing the appellants' suit with costs is hereby set aside.

Instead, judgment be and is hereby entered for the appellants against the respondent for the sum of Kshs.2,400,000/= being general damages under the **Fatal Accidents Act** for loss of dependency.

The appellants shall have the costs both in the lower court and this court.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**04.10.2018**

[Delivered and signed this 4<sup>th</sup> day of **October, 2018**].

In the presence of Mr. Ochieng for M/s Nannungi for the Appellants and M/s Odoyo holding brief for Omwenga for respondent.

**J.R. KARANJAH**

**JUDGE**