



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL NO. 227 OF 2011**

**BETWEEN**

**DEUS OTIENO OGUDA**

**suing as the administrators of estate of**

**DANIEL ODHIAMBO OGUDA (DECEASED) .....APPELLANT**

**AND**

**CHANNAN AGRICULTURAL CONTRACTORS (K) LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment and Order of Hon.E. Maina, PM at the Chief Magistrates Court at Kisii in Civil Case No. 133 of 2010 dated 4<sup>th</sup> October 2011)*

**JUDGMENT**

1. The appeal arises from an accident that took place on 6<sup>th</sup> December 2017 at Bridge Camp along the Kisumu – Kisii road. The deceased was driving a tractor registration number KAP 754G when it lost control as a result of defective braking system and lack of maintenance. The deceased died after being thrown off the tractor. His administrator sued the respondent for damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** (“the **LRA**”) and the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** (“the **FAA**”). The trial magistrate apportioned liability at 80:20 against the respondent and made the following award under the **LRA**:

Pain and Suffering	Kshs. 16,000.00
Loss of expectation of life	Kshs. 80,000.00
	Kshs. 96,000.00
Less 20%	(Kshs. 19,200.00)
<b>TOTAL</b>	<b>Kshs. 76,800.00</b>

2. As the appellant was dissatisfied by the failure of the trial court to make an award under the **FAA**, he lodged this appeal. In the amended memorandum of appeal dated 18<sup>th</sup> July 2018, the appellant contended that the trial magistrate ought to have held that as the administrator of the estate, the appellant was the proper person to pursue the claim on behalf of the dependants under **section 4** of the **FAA**. The appellant complained that the trial magistrate erred in finding that the appellant did not prove dependency despite sufficient evidence. The appellant urged the court assess damages based on the facts pleaded and evidence adduced. Counsel for appellant reiterated these grounds in his oral submissions.

3. Although served with a hearing notice, counsel for the respondent did not attend court for the hearing.

4. The finding and conclusion of the trial magistrate on the issue of damages under the **FAA** was as follows:

*Damages under the Fatal Accidents Act can only be awarded to a parent, spouse or child of the deceased. The plaintiff is a brother of the deceased. He has pleaded that the deceased left a wife and 2 children but that was not proved. He could at least have tendered a letter from the area chief listing names of those who survived the deceased. It is not sufficient to plead it. The fact that letters of administration were issued to him alone is also telling because under section 58(1) of the Law of Succession Act where a continuing trust arises no grant of letters of administration shall be made to one person unless it is to the Public Trustee or a trust corporation.*

*In the circumstances no damages shall be awarded under the Fatal Accidents Act. Indeed it is also very telling that the plaintiff could not recall the names of the children yet he claims to be living with them.*

5. The resolution of this appeal revolves around the interpretation of **section 4(1)** of the **FAA** whose side note reads, “Action to be for benefit of family of deceased” and which provides as follows:

*4(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the 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. [Emphasis mine].*

6. **Section 7** of the **FAA** referred to in **section 4(1)** aforesaid makes provision for, “Action by persons beneficially interested” and it states as follows:

*7. If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought, if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator. [Emphasis mine]*

7. A reading of **sections 4(1)** and **7** of the **FAA** clearly shows that either the administrator or executor of the deceased’s estate or the persons who for whose benefit the action is brought, that is the wife, parent, husband or child of the deceased have a right to bring an action for damages. It must be recalled that the purpose of the **FAA** is to provide compensation for the deceased’s dependants following his or her death. Thus, even when the administrator or executor brings the action, the amount so recovered does not go to the estate but must be divided among the dependants on whose behalf the action is brought.

8. I therefore find and hold that the trial magistrate fell into error when she held that the plaintiff, who had letters of administration for the estate of the deceased could not bring the action. It would have been different if he did not have the grant as he would not have the *locus standi* to agitate the claim either on his own behalf or on behalf of dependants because as a brother of the deceased he is not a recognised dependant under **section 4(1)** of the **FAA**.

9. Since the claim under the **FAA** was properly brought, I must now consider the pleadings and evidence to assess damages. In doing so, I am aware of the duty of the first appellate court so clearly elucidated in the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang stated:

*This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*

*However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*

10. The action was brought by the plaintiff on behalf of the following dependants: Milycent Achieng (wife), Velma Akinyi (daughter), Grivin Adhiambo (son), Deus Otieno Oguda (elder brother), Antonius Odhiambo Oguda (brother) and Livingstone Otieno Oguda (brother). According to the plaintiff, the deceased at the time of death was aged 28 years, “enjoyed good health and lived a happy and vigorous life.”

11. The key witness on the issue of damages was the deceased’s brother, Deus Otieno Oguda (PW 3). He told the court that the deceased was working for the respondent company and that he had a wife and two children aged 2 years and 8 months respectively. He further testified that the deceased had worked for the respondent for 5 years and that he used to support the family. In cross-examination, he admitted that he did not have the marriage certificate and that he was living with the deceased’s wife and children.

12. There was also the testimony of Richard Okumu Odongo (PW 4) who testified that when the accident took place he heard that deceased cry for his wife and children when he was thrown out of the tractor. At the scene of the accident, he found the deceased’s identity card and petty cash/salary voucher in the name of the defendant company which was produced in evidence. Thomas Matwetwe Kinyoro (DW 1) also admitted that the deceased was working with the respondent as a driver. He could not tell how much the deceased was being paid.

13. From the evidence I have outlined, the first question then is whether the appellant proved on the balance of probabilities that the persons so listed in the plaintiff were the dependants and second, the measure of damages under the **FAA**.

14. On the first issue of dependants, **section 8** of the **FAA** requires that the plaintiff to deliver full particulars of the persons for whom damages claimed. It provides as follows:

*8. In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the*

statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

15. The plaintiff set out particulars of those persons in the plaint although and by virtue of **section 4(1)** of the **FAA**, the deceased's brothers are excluded as dependants. From the record, the appellant supported that averments in the plaint and the evidence of PW 4 confirmed that the deceased, in his dying declaration, stated that he had a wife and children. It was thus unnecessary for the trial magistrate to insist that the appellant ought to have provided the chief's letter. Since this evidence was not controverted, there was sufficient evidence to meet the burden of proof on this issue and I accordingly find that the appellant proved that the deceased had a wife and two children.

16. The manner of assessment of damages under the **FAA** was **succinctly put** by the East Africa Court of Appeal in **Chunibhai J Patel and Another v PF Hayes and Others [1957] EA 748, 749** as follows:

*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 dependants 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.*

17. There is no doubt that the deceased worked for the respondent, a fact admitted by DW 1. The voucher produced by PW 4 showed that the deceased earned Kshs. 9,850/-. I accept it because the respondent had an opportunity to contest this evidence since the deceased was its employee and the fact of his income was a matter within its knowledge. I therefore find and hold that the deceased was earning about Kshs. 9,850/- a month as a tractor driver with the respondent. This amount is below the taxable income hence it does not attract income tax and from the voucher, there is no indication of other statutory deductions.

18. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In arriving at the multiplier, the court should consider the circumstances and conditions of life of the deceased could have lived, keeping in mind that the standard of life, the life expectancy in Kenya has reduced over the years and the period of expected dependency. The deceased was aged 28 years when he died. He probably would have worked until he was 55 years but taking into account the factors I have cited and other imponderables, I award a multiplier of 19 years.

19. The dependency ratio reflects the amount the deceased would have expended in supporting his wife and children but for his death. In this case, the deceased had a young family which was depending on him and he would spend a substantial portion of his income on them. I would therefore use 2/3 as the dependency ratio.

20. I find that the amount due to the appellant under the **FAA** is **Kshs 1,497,200/-** made up as follows **9850 X 12 X 2/3 X 19**. I therefore allow the appeal to the extent that I now award the appellant the sum of **Kshs. 1,497,200/-** as loss of dependency under the **FAA**. The total award due to the appellant shall there be as follows;

Loss of dependency	Kshs. 1,497,200.00
Pain and Suffering	Kshs. 16,000.00
Loss of expectation of life	Kshs. 80,000.00
Total	Kshs. 1,593,200.00
Less 20%	(Kshs. 318,640.00)
<b>TOTAL</b>	<b>Kshs. 1,274,560.00</b>

21. The amount foresaid shall accrue interest at court rates from the date of judgment in the subordinate court. The appellant shall have costs of this appeal which I assess at **Kshs. 70,000/-** only.

22. When the court makes an award under the **Fatal Accidents Act**, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the appellant to file the necessary application for consideration before this court in due course before the decretal sum is released by the respondent.

**DATED and DELIVERED at KISII this 12th day of November 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyatundo instructed by Nyatundo and Company Advocates for the appellant.

Amit R. Gadhia and Associates Advocates for the respondent.