



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 230 OF 2007

ESTHER CHEMUTAI KIBET (Suing as the legal representative of the Estate of the late JOSEPH MALAKWEN BETT).....APPELLANT

VERSUS

CARBACID (C02) LIMITED.....1ST RESPONDENT

JOHN KIPKEMBOI MITEI.....2ND RESPONDENT

(An Appeal From Judgment of Hon. G.C. Mutembei (MR) Chief Magistrate Nakuru Delivered on 21st November 2007 In Naruru CMCC No. 867 of 2001)

JUDGMENT

1. The appellant filed the trial court suit following the death of the deceased, her husband from a road traffic accident that occurred on the 5th December 1999 along Nakuru/Eldoret Highway involving two vehicles. The deceased was a passenger in motor vehicle registration Number KAK 835D that collided with motor vehicle KAD 709W registered in the 1st Respondents name and at the material time being driven by the 2nd Respondent. Her claim was for compensation under both the **Law Reform Act** and the **Fatal Accident Act**.

Upon service of summons, the defendants enjoined two other parties by way of third party proceedings, the 1st third party and the 2nd third party. These third parties did not appear or file their defences.

2. Interlocutory judgment was therefore entered against these parties. The suit was therefore left for determination upon evidence between the appellant and the Respondents herein.

Upon hearing the trial Magistrate in his judgment dated 21st November 2007 dismissed the case on grounds that the plaintiff did not prove her suit against the respondents. It was his further finding that the suit was incompetent and struck it out with costs.

3. The appeal challenges the trial Magistrates findings and dismissal of the suit.

In summary, the trial courts judgment is faulted on the findings on liability and his failure to assess damages that would have been awardable had the suit succeeded.

4. In the parties written submissions, several issues were framed. I find it proper to adopt the issues as framed and deal with each sequentially abate that most are interrelated.

There is one fundamental and primary issue raised by the Respondents that the court will deal with first.

1. Whether the Appeal herein is lawfully and competently before the court.

Determination of the above issue will pave the way forward on this appeal, whether to strike it out or to proceed to interrogate the grounds of appeal as stated by the appellant.

5. In a bid to answer the first issue above, I have sought to confirm from the trial court file when indeed the Memorandum of Appeal was filed. I have seen the court payment receipt on filing of the Memorandum of Appeal issued on the 10th December 2007 and the original Memorandum of Appeal duly stamped on the 10th December 2007. That confirms that the Memorandum of Appeal was filed within the 30 Days prescribed under **Section 79G of the Civil Procedure Act**, and not on the 24th February 2010 as submitted by the Respondents. The appeal is therefore competently before the court.

6. The appellant paraphrased and summarised his eight grounds of appeal to two thus

1. That the Learned trial Magistrate erred in law and fact in finding that the Appellant had not proved her case on a balance of probability and by placing the burden of proof on the Appellant which was higher than it is required in civil jurisprudence.

2. That the trial magistrate erred in law and fact in failing to consider the overwhelming evidence on record thus arrived at a wrong decision both on liability and failure to assess damages payable to the appellant.

7. This court being the first appellate court will reconsider the evidence adduced before the trial court and come up with its own findings and conclusion.

See **Selle -vs- Associated Motor Boat Co. Ltd & Others (1986) EA 123.**

I shall also revisit the pleadings in view of the trial courts findings that the appellants suit was incompetent from the beginning.

8. The Appellant's pleadings

The appellant's plaint is dated 16th March 2001. It was verified by an affidavit sworn on the 11th July 2000 and filed on the 21st May 2001. In the plaint the appellant is described as suing as the Legal Representative of the Estate of the Late Joseph Malakwen Bett.

In the body of the plaint, Paragraph 7, particulars of the defendants for whose benefit the claim was brought are stated as herself and seven children of the deceased. Paragraph 11 thereof sets out the prayers as compensation by way of Damages under the Law Reform Act and under the Fatal Accidents Act, special damages and costs. At Paragraph 5 of the plaint, particulars of negligence attributed to the Defendants as owner and driver of the accident vehicle are also stated.

9. I have taken liberty to set out particulars stated in the appellants plaint above because in his judgment, the trial magistrate stated that the suit was incompetent from the onset, and that

“from the pleadings, the appellant is not described as the administrator or legal representative of the estate of the deceased, whereas the plaint is dated 16th March, the 2001, the Verifying Affidavit is dated 11th July 2000. This is before she obtained the letters of Administration ad colligenda on 23rd February 2001.”

10. I want to pause there. I am unable to understand the trial magistrates reasoning that

“the appellant is not described as the administrator --- yet I have seen the plaint, assuming the plaint on record is the same one the trial magistrate saw--- where she is thus described.”

May be it is the format and if it is so, provisions of **Order 2 rule 1** and **Order 51 rule 10(2) and Article 159(2)(d)** of the **Kenya Constitution** cures the defect in format and technicalities that do not go into the merits of a suit or any pleading.

11. The Respondents in their submissions in answer to the grounds of appeal submit that the appellant had no *locus standi* to bring the suit on behalf of the deceased's estate on the following grounds that:

1. ***She is not described as the administrator or legal representative of the estate***
2. ***the plaintiff did not provide any evidence to show that the alleged deceased Joseph Malakwen Bett died.***
3. ***the appellant did not produce evidence to prove that she and her alleged seven children were dependants of the deceased.***
4. ***that no evidence of earnings of the deceased was adduced and therefore supports the trial courts findings and conclusion that the case was incompetent.***

12. On the matter of the plaint and verifying affidavit, it is evident that the verifying affidavit was sworn before the plaint was dated or drawn. The question that arises is therefore whether a plaint verified by an affidavit sworn before it is dated or drawn makes the suit fatally defective. That is the submission by the respondents. On the contrary, the appellants submit that there is no requirement under the law that the verifying affidavit cannot be sworn before the plaint is dated or prepared. The purpose for a

verifying affidavit is to certify and verify the contents stated in the plaint, so that if the plaint is not prepared, then there would be no contents to verify.

It has been held in various decisions courts that a defective verifying affidavit is not a cause to dismiss a plaint as defective.

13. The power to strike out a plaint that is not accompanied by a verifying affidavit or a defective verifying affidavit is not mandatory but permissive, a principle that was reiterated by the Court of Appeal in **Unity Auto Hardwares Stores (1972) Ltd -vs- Dayalal Bhanji & Sons Ltd C.A No 281 of 2007 (2005) e KLR**.

While quoting from **D.T. Dobie & Co. (K) Ltd -vs- Muchina (1982) e KLR** The Judges stated:

“the plaintiff should not be driven from the judgment seat unless the case is unarguable, apply more force to discretion to strike out a plaint for want of a verifying affidavit--- that the omission does not go to the root of the claim --- that was procedural error which the court could in exercise of its discretion correct at any time before the suit was heard.”

14. In **Nkube -vs- Nyamoro (1983) e KLR** the court held that:

“A Court of Appeal will not normally interfere with finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principle in reaching his conclusion.”

15. Upon such jurisprudence, the Learned Judges of Appeal held that the Learned magistrate erred in law and fact in failing to hold that the verifying affidavit to the plaint was not incurably defective and sustained the suit as competent.

Order 4 rule 1 of Civil Procedure Rules provides what documents ought to accompany a plaint, a verifying affidavit being one of them.

In the strict sense, a verifying affidavit is not a pleading but a document as envisaged under the above order.

In the **Unity Auto Hardwares case (Supra)** the court held that:

“that was a procedural error which the court could, in exercise of its discretion correct at anytime before this suit was heard.”

16. The rationale by the Learned Judges was that even if the trial magistrate had struck out the plaint following the revelation that the verifying affidavit was defective, the Court of Appeal in **Kenya Oil Co. Ltd -vs- Jayantilal Dharanish Gosrani (2014) e KLR** was saying that should not have happened as the defect was curable and did not go to the root of the claim, and the court had the discretion not to strike out the suit as the respondents' rights had matured and the court could not allow itself to be used to defeat a party's matured rights. The Judges proceeded to express themselves that they did not think the intention of the Rules Committee was to punish litigants or deny them access to justice.

17. I associate myself with the above jurisprudence as the swearing of the verifying affidavit before the plaint was signed/prepared is a mere irregularity, a procedural flaw that ought not be used to deny a litigant access to justice.

Order 19 Rule 8 of Civil Procedure Rules states that:

“unless otherwise directed by the court, an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.”

I concur with the holding by Justice Ringera (as he then was) in the **Microsoft Corporation -vs- Mitsumi Computer Garage (2001) 2 EA 460** that **“Rule of procedure are--- the mistress of justice.”**

Section 3A of the Civil Procedure Act is clear that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

18. It is therefore my finding that the trial magistrate erred in law and fact in holding that the appellants' suit was incompetent from the onset and proceeded to strike it out.

Having made my findings and conclusion on the two salient issues above, I now shall proceed to reconsider and re-evaluate the evidence adduced before the trial court.

19. **The Appellants' evidence.** PW1 was the appellant Esther Chemutai Kibet. It was her evidence that upon the death of her husband the deceased with whom they had sired seven children, she filed Succession Cause being **HC Succession Cause No. 59 of 2000** at the High Court at Nakuru and obtained a police abstract. She testified that she did not witness the accident so could not testify as to how it happened. It was her further evidence that the deceased was a *shamba* boy working for Brooke Bond Kericho, and used to assist her and the children with his salary of Kshs.4000/= per month though she had no documents to prove the income.

20. Upon cross examination by Advocates for both defendants, she reiterated that the deceased was her husband and had the original letters of Administration.

On the 18th April 2005, by consent of parties, the deceased's Death certificate was produced as PExh I, while the police Abstract was produced as PExh2. On 11th July 2007, it is recorded that:

“By consent the plaintiffs' Letters of Administration be produced as PExh 4 and search

certificates as PExt 5.”

The documents were thus produced and admitted as exhibits by consent.

21. PW2 was Jane Moraa Nyamweya

Her evidence was that she was a passenger in the defendants motor vehicle, that the vehicle was being driven on its left side lane, when a lorry from the opposite direction left its lane and came onto the lane of the vehicle she was travelling in, that the driver of the lorry Registration number KAD 709W as charged at Molo Court where she was called to testify but the accused died before conclusion of the traffic case.

On cross examination, she blamed the lorry driver for driving on the wrong side of the road.

22. PW2 was PC Eric Onger

A traffic police officer Molo police station. Using the police file on the accident, he testified that the accident was between the Respondents Lorry KAD 709W and KAD 707W, that the investigation report indicated that the lorry veered off the road and hit the *matatu* and the point of impact was on the left side of the road as shown on the sketch plan. He testified that ten people died and others were injured and that among the dead was the deceased Joseph Malakwen Bett.

He further testified that the driver of KAD 709W was charged with the offence of causing death by dangerous driving in **Molo Traffic Case No. 493/2000** but the accused died before the case was concluded. He produced the police file as plaintiff Exhibit No.3 and reiterated that the driver of KAD 709W was to blame for the accident.

23. The defendants now Respondents did not call any evidence, and parties proceeded to file their written submissions.

24. In his judgment, the trial Magistrate stated that he considered the evidence on record and made a finding that the plaintiff did not produce any evidence that the alleged Joseph Malakwen Bett died nor did she produce any evidence to prove that her alleged seven children were dependents of the deceased (page 2 of the Judgment) nor did she prove earnings of the deceased hence not possible to determine the age of the deceased.

25. I have carefully considered the evidence on record. The Learned Magistrate did not address himself on the issue of liability. He made no finding on the causation of the accident and culpability of either of the two drivers of the accident vehicles.

26. It is however recorded on page I of his judgment that the police officer confirmed that the deceased died in the accident involving motor vehicle Registration No. KAD 709W and KAK 358D, and that the driver of KAD 709W was charged with the traffic offence of causing death by dangerous driving driving.

Further, the Learned Magistrate went ahead to state that the plaintiff/appellant produced records for Registrar of Motor vehicles showing ownership of motor vehicle KAD 709W as the 1st defendant/Respondent and Letters of Administration *ad colligenda* allowing her to bring action on behalf of the estate of Joseph Malakwen Bett.

27. It is therefore not clear on what basis the trial Magistrate finally made a finding that the appellant did not produce any evidence to prove that the alleged Joseph Malakwen died, when the death certificate was duly produced by consent of all counsel representing the various parties. His finding that the death of the deceased was not proved is erroneous and out of tune with the evidence on record.

28. The police officer confirmed that one of the deceased from the accident was Joseph Malakwen Bett. This evidence, and largely the appellants evidence was not challenged at all. It is also evident that

all documents in support of the claim were produced by consent. None of the parties doubted the death certificate as a confirmation that indeed the deceased died in the accident.

29. I find it disturbing and not acceptable in the face of such uncontraverted and unchallenged evidence that the trial magistrate could arrive at the finding that the appellant failed to prove her case against the respondents. I have no difficulty in setting aside the said findings and conclusions.

30. On the matter of negligence upon analysis of the evidence, I come to the conclusion that the driver of motor vehicle Registration number KAD 709W being the 1st Respondent is vicariously liable for the negligence of his driver the 2nd Respondent, and therefore vicariously liable in damages.

31. **Quantum of damages**

The trial Magistrate failed to assess damages awardable to the appellant had the suit succeeded. This was an error in law. I now proceed to interrogate the claim for compensation under the **Law Reform Act** and the **Fatal Accidents Act**.

32. The claim under the **Law Reform Act Chapter 26 Laws of Kenya** is for the benefit of the deceased's estate. I agree with the Respondents submissions that Letters of Administration granted to the appellant were so done after filing of the suit. As such, at the commencement of the suit, she was not the legal administrator of the deceased's estate.

The damages awarded for pain and suffering as well as loss of expectation of life is a benefit that ought to go to the estate and without letters of administration of the deceased's estate, such damages cannot be awarded.

There shall be a Nil damages under the Law Reform Act.

33. Damages under the **Fatal Accidents Act** are awardable for the benefit of the deceased dependants. The Respondent submissions are that the appellant failed to prove by evidence that she was a wife and the children of the deceased therefore no dependency was proved.

In her evidence in Chief, the appellant testified that she was a wife of the deceased with whom they sired seven minor children. Upon cross examination she stated that she had left the children's birth certificates at home, and on re-examination stated that nobody challenged that the children were hers.

34. This is one of those grey areas where a court is left to exercise its discretion when no documents are produced to determine whether a plaintiff is an administrator or legal representative of the Estate of a deceased person is either a wife or husband or child of the deceased. In my opinion, it is common to find a lot of people in the country who do not have any documents like birth certificates or marriage certificates or any form of documents to confirm their status as wife/husband or child. This is either out of ignorance and/or poverty. I am not suggesting that ignorance and/or poverty is an excuse or defence in law. It is trite however that documentary evidence is not the only way to prove income of a person as a lot of people usually in informal employment and self employed in their farms do not have payslips or accounts to evidence their income yet they financially support their dependants adequately from their honest incomes.

In **Jacob Ayiga Maruja & Another -vs- Simeon Oboyo (2005) e KLR** the Court of Appeal held that documentary evidence is not always necessary and not the only way to prove earnings.

35. Further in **HCCC No. 21 of 2013 (Muranga) Nicholas Njue Kahuro (2014) e KLR**, the court quoting from the **Jacob Agiya** case (Supra) rendered itself that insistence of documents to prove income by many illiterate Kenyans who do to keep records would do a lot of injustice to them yet they earn their livelihood in many various ways and, and reiterated that it is not only documentary evidence that can prove ones income.

I subscribe to the Learned Judges observations.

36. In this appeal, the appellant did not produce any documents to prove she was wife, and the children of the deceased as I have stated above. See **Section 4 of the Fatal Accidents Act**.

In **Agnes Bosibori Ogega-vs- Tea Research Foundation & Another (2016) e KLR (Kimaru J)** the court considered the plaintiff and six children with the deceased. There was no documentary proof of marriage or birth certificates of the children. The court however found that oral evidence that was not controverted as sufficient to recognize the plaintiff and children as dependants of the deceased.

37. The appellant had filed the suit as the Administrator and personal representative of the estate of the deceased under the Fatal Accidents Act. The Appellants evidence was uncontroverted. It is therefore not available for the respondents to challenge the dependency on appeal level when it was not challenged during the main hearing by way of cross examination of evidence.

See also **Ann Wangare Mwombe & 2 Others -vs- Peter Mukiri Gateri (2014) e KLR** where the court admitted the wife and children of the deceased as dependants without documentary proof of marriage and births of the children, and proceeded to award them damages under the Fatal Accidents Act.

38. For the appellant reasons, I am persuaded to hold that the appellant was a wife of the deceased and the seven children stated in the plaint are dependants, as envisaged under Section 4 of the Fatal Accidents Act, and therefore entitled to an award of damages for loss of dependency.

39. The deceased was 44 years old at the time of death. Evidence was adduced that he was earning Kshs.4,000/= per month as a *shamba* boy at Brooke Bond Kericho. These facts are not contraverted. Even if there was no documentary proof of the income, no evidence was tendered to contravert the appellant's evidence that the deceased was working as a *Shamba* boy. In the absence of such documents, it would be save to consider the basic wages, of a *shamba* boy in the year 2009. Though no wages Guidelines were provided by either party, I find the sum of Kshs.4,000/= even without any documentation to have been fair and reasonable. I shall adopt the same as the monthly income by the deceased.

40. The deceased would, save for servitudes of life, continued to work upto old age. No evidence of ill health or otherwise was tendered.

For the multiplier, I am persuaded that **10 years would be a reasonable multiplier**. I have made a finding that the deceased was survived by a wife and children who depended on him for their livelihood.

A Multiplicand of 2/3 will be adopted in the assessment of damages for loss of dependency, taking guidance from the principles stated in the celebrated case of **Beatrice Wangui Thairu -vs- Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1538 of 1988**.

41. I proceed to compute loss of dependency as follows:

$$4,000 \times 12 \times 10 \times \frac{2}{3}$$

$$= \text{Kshs.320,000/=}$$

Special damages were not pleaded. None will be awarded.

42. In the end the appeal succeeds. The trial Magistrates Judgment delivered on the 21st November 2007 is set aside and substituted with a judgment that

- 1. The Respondents are wholly jointly and severally liable in negligence and damages.**
- 2. That the appellant is awarded a sum of Ksh 320,000/= being loss of dependency under the Fatal accidents Act.**

3. *That the said award shall carry interest at court rates from the date of this judgment.*
4. *That the respondents shall bear costs of this appeal.*
5. *This case was chosen as a TEST SUIT by order of the court issued on the 22nd June 2004 in High Court Miscellaneous Application No. 94 of 2000. Judgment on liability hereof shall apply to the cases stated in the said court order being:*

(1) *Eldama Ravine PMCC No 25 of 2000*

(2) *Kericho PMCC No. 809 of 2002*

(3) *Limuru PMCC No. 88 of 2001*

It is so ordered.

Dated, Signed and Delivered this 16th Day of February 2017.

J.N. MULWA

JUDGE