REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 23 OF 2013

BETWEEN

PETERSON MOKAYA KAGUGA suing as the administrators of the estate of JACKLINE MOKAYA …….. APPELLANT

AND

JAMES MBUYA ……. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. N. Makila, RM in Principal Magistrates Court at Oyugis in Civil Case No. 75 of 2012 dated 26th November 2013)

JUDGMENT

1. In the subordinate court the appellant, as administrator of the estate of the deceased, filed the suit against the respondent seeking compensation as a result of a road traffic accident which occurred on 31st March 2012. According to the pleadings and evidence, the deceased was walking along the Miruka-Kisii Road when at Miruka market she was hit by the respondent's motor vehicle. The respondent filed a defence denying liability and instead blamed the deceased for walking on the highway. Ultimately, the issue of liability was settled by consent of the parties with the respondent bearing 65% and the appellant shouldering 35% liability.

2. The matter proceeded for assessment of damages. The court below held as follows;

The Plaintiff herein failed to seek letters of administration as litem as is required by law and proceeded to file this case as the alleged personal representative and administrator. The plaintiff relied on a chief's letter to prove dependency.

I find that the Plaintiff failed to show any locus standi to warrant him instituting the instant suit on behalf of the Plaintiff. For this reason I find that the suit is incurably defective and I hereby dismiss the same with costs to the Defendant.

3. Although the court dismissed the suit, it proceeded to assess damages. The court declined to award special damages amounting to Kshs 4,100/- as this sum was not proved but awarded a global award of Kshs 600,000/- subjected to 35% contribution for loss of dependency under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

4. The appellant appeals against the judgment on the following grounds set forth in the memorandum of appeal dated 9th December 2013;
    1. *The Learned Honourable Magistrate erred in both fact and law in finding that the*

Appellant lacked locus standi in bringing the original suit.

2. *The Learned Honourable Magistrate erred in law and in fact in finding that the Appellant lacked locus standi and failing to appreciate the fact that the parties had already recorded a consent on liability, and the only outstanding issue was the assessment of damages.*
3. *The Learned Magistrate erred in both law and fact in arriving at a decision which was not only manifestly unjust but also against the weight of the evidence on record.*
4. *The Learned Trial Magistrate erred in both law and in fact in failing to appreciate the fact that the Appellant had limited his claims under the* ***Fatal Accidents Act*** *and not claimed under the* ***Law Reform Act*** *and as such it was not mandatory for him to take out letters of administration ad litem before institution of the suit.*

5. In summary, the issue raised is whether the appellant had *locus standi* to institute the proceedings in the subordinate court. Counsel for the respondent properly conceded that learned magistrate erred in finding that the appellant had no *locus standi*. Counsel for the respondent pointed out that the error was a result of the manner in which the plaintiff pleaded his case at paragraph 1 of the plaint which stated that he instituted the case, *"as the administrator and personal representative of the estate of one Jackline Morara Mukoyi."* **Section 4(1)** of the ***Fatal Accidents Act*** states in part that;

> *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 …..…*

It clearly empowers the administrator or executor of the estate to bring the suit on behalf of the dependants of the deceased hence the suit was properly instituted.

6. **Section 7** of the ***Act*** provides that if there is no administrator or executor appointed within 6 months of death the suit may be instituted in the names of all the dependants. 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 added]*

7. The issue of whether a plaintiff lodging a claim under the ***Fatal Accidents Act*** requires a grant of letters of administration was recently dealt with by the Court of Appeal in ***James Mukolo Elisha & Another v Thomas Martin Kibisu*** **NRB CA Civil Appeal No. 31 of 2006 [2014]eKLR**. The Court reiterated the position settled in ***Troustik Union International & Another v Mrs Jane Mbeyu & Another*** **MSA CA NO. 145 of 1991[1993]eKLR** that a claim under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** being one for the benefit of the deceased's estate must be preceded by a grant of letters of administration. In making a distinction between the ***Law Reform Act*** and the ***Fatal Accidents Act***, the Court relied on the provisions of **section 7** of the ***Act*** and the finding in ***Troustik Case*** where the Court held that widows who had not obtained grant of letters of administration had the *legal competence to claim damages for loss of dependency under the* ***Fatal Accidents Act****.*

8. Both parties to the appeal addressed the court on the issue of quantum. The appellant submitted that the learned magistrate did not make a finding on quantum as required by the law. The respondent argued that there was insufficient evidence to support the award of damages.

9. The court did consider the issue of quantum and awarded a global sum of Kshs 600,000/- for loss

of dependency under the ***Fatal Accidents Act***. In this respect, the appellant's submission proceeded on the wrong assumption that no damages had been assessed. As I understand from the memorandum of appeal, the appellant did not appeal against the finding of the learned on quantum. I therefore find no basis for interfering with the decision of the learned magistrate. The respondent did not cross-appeal against the award of damages hence there is no basis to interfere with the award.

10. Accordingly, I allow the appeal and make the following orders;

a. I set aside the decree dismissing the suit and substitute it with a decree entering judgment for the appellant against the respondent for the sum of Kshs 600,000/- subject to the agreed 35% contribution.
b. The said sum shall accrue interest from date of judgment in the subordinate court.
c. The appellant shall have the costs in the subordinate court and of this appeal.

DATED and **DELIVERED** at **HOMA BAY this 7th day of November 2014.**

D.S. MAJANJA

JUDGE

Ms Orege instructed by Odero Okeyo and Company Advocates for the appellant.

Mr Otieno instructed by O. M. Otieno and Company Advocates for the respondent.